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ONTARIO LABOUR RELATIONS BOARD REPORTS



October 1987



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ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1987] OLRB REP. OCTOBER

EDITOR: COLLEEN EDWARDS

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
Reports*, Butterworth & Co., Toronto.

Typeset, Printed and Bound by Union Labour in Ontario



CASES REPORTED

1.	L'Abbe Construction (Ontario) Ltd.; Re L.I.U.N.A., Local 527; Re Canadian Construction, Building Maintenance and General Workers' Union (N.C.C.L.).....	1191
2.	Angus J. MacKinnon Consultants Limited, A.J. MacKinnon & Associates; Re L.I.U.N.A., Ontario Provincial District Council.....	1204
3.	Beacon Transit Lines Incorporated; Re Teamsters' Union, Local 938	1206
4.	Black & McDonald Limited; Re S.M.W.	1208
5.	Blair, Winston Alfonso; Re U.S.W.A.; Re Midas Canada Inc. and International Parts Manufacturing Limited	1211
6.	Co-Fo Concrete Forming Construction Limited; Re L.I.U.N.A., Local 1059.....	1213
7.	Connie Steel Products Limited; Re Leonardo Delprete, et al.; Re B.S.O.I.W., Shopmen's Local Union No. 834	1225
8.	D.E. Witmer Plumbing and Heating Limited; Re U.A., Local 527; Re Group of Employees; Re Bill Hennink and Bill Bonvanie	1228
9.	Darrow Developments Ltd.; Re L.I.U.N.A., Ontario Provincial District Council.....	1238
10.	Dresser Canada, Inc.; Re CAW; Re Group of Employees; Re U.S.W.A.	1243
11.	Hinkson, George; Re Canadian Conference of Teamsters, Chemical, Energy & Allied Workers Division, Local 2177; Re BASF Inmont Canada Inc.	1246
12.	Hollingworth Drain Services; Re C.J.A., Local 27.....	1250
13.	J.C. Electric, John Anthony Waite c.o.b. as; Re I.B.E.W., Local 1687	1251
14.	Kimberly Clark of Canada Inc.; Re Lumber and Sawmill Workers' Union, Local 2693	1255
15.	King Nursing Home Ltd.; Re C.L.A.C.	1257
16.	Kirouac Contracting Ltd.; Re I.W.A.; Re Lumber and Sawmill Workers Union, Local 2693 of the C.J.A.; Re C.P.U.	1262
17.	Laidlaw Waste Systems Ltd.; Re Teamsters' Union, Local 419; Re L.I.U.N.A., Oil and Gas Technicians, Service, Domestic & General Workers Union, Local 1267.....	1267
18.	Lambton County Board of Education, The, C.U.P.E., Local 1019 and; Re Betty Jean Luno.....	1277
19.	Laval Tool & Mould Inc.; Re Windsor Mouldmakers Union, Local 1680, C.L.C.; Re Group of Employees	1281
20.	Lecours Lumber Company Limited; Re I.W.A.	1286
21.	Menkes Developments Inc.; Re L.I.U.N.A., Local 506; Re L.I.U.N.A., Local 183	1290
22.	Mollenhauer Limited; Re C.J.A., Local 27; Re L.I.U.N.A., Local 183; Re M.T.A.B.A.; Re Ellis-Don Limited; Re The Form Work Council of Ontario; Re Milne & Nicholls Ltd....	1294
23.	Niagara Mechanical Contractors Limited, U.A., Local 46 and Chris Thurrott; Re L.I.U.N.A., Local 506.....	1295

24.	Nimel Construction Limited; Re C.J.A., Local 27; Re L.I.U.N.A., Local 183	1299
25.	Royal Mattress Mfg. Co.; Re U.F.C.W.	1302
26.	Runnymede Development Corporation Limited; Re C.J.A., Local 27; Re L.I.U.N.A., Local 183	1305
27.	Sault Ste. Marie, The Corporation of the City of; Re L.I.U.N.A., Local 1036; Re R.E. Morcan, C.U.P.E.; Re C.J.A., Local 446	1319
28.	Strongland Construction Ltd.; Re C.J.A., Local 27.....	1330
29.	Thornton Sand & Gravel Limited; Re L.I.U.N.A., Local 1059; Re Group of Employees	1331
30.	Wire Rope Industries Ltd.; Re I.W.A.; Re Lumber and Sawmill Workers' Union, Local 2693 of the C.J.A.	1336

SUBJECT INDEX

- Abandonment - Certification - Collective Agreement - Trade Union Status - Applicant arguing intervener had lost its trade union status by ignoring its constitution for several years - Intervener found to not entirely have abandoned its constitution - Not ceasing to operate as a trade union - Intervener not having abandoned its bargaining rights through inactivity - Foreman not involved in the administration of the union so as to deem agreement not to be a collective agreement - Collective agreement between intervener and respondent constituting a bar to the certification application
- L'ABBE CONSTRUCTION (ONTARIO) LTD.; RE L.I.U.N.A., LOCAL 527; RE CANADIAN CONSTRUCTION, BUILDING MAINTENANCE AND GENERAL WORKERS' UNION (N.C.C.L.) 1191
- Bargaining Unit - Certification - Whether graduate and registered nurses should be excluded from an all employee nursing home service unit on basis of community of interest or past practice - Board not prepared to conclude that past practice in hospital sector should be applied to nursing home sector - Past practice in nursing home sector ambiguous - Respondent making no submissions with respect to community of interest factors - Board determining that all employee unit viable
- KING NURSING HOME LTD.; RE C.L.A.C. 1257
- Bargaining Rights - Certification - Construction Industry - Parties - Practice and Procedure - Employer seeking to resile from agreement on employee list and revert to earlier position - Inappropriate for Board to permit employer to resile - Labourers' Union seeking to intervene in carpenters application on the basis that it represented all construction employees of the employer pursuant to a collective agreement between it and the Housing Labour Bureau - Labourers' Union denied intervener status on basis of collective agreement which does not cover carpenters - Labourers' Union granted status to intervene based on membership evidence submitted on date of hearing - Labour relations officer appointed
- RUNNYMEDE DEVELOPMENT CORPORATION LIMITED; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183 1305
- Bargaining Unit - Certification - Construction Industry - Representation Vote - Whether appropriate to include steamfitters in plumbers unit when separate certified trades and employer not employing any steamfitters - Standard unit including steamfitters granted - Irrelevant whether there are employees in all the classifications used to describe that standard unit - Board exercising its discretion to order a representation vote because of improper union conduct
- D.E. WITMER PLUMBING AND HEATING LIMITED; RE U.A., LOCAL 527; RE GROUP OF EMPLOYEES; RE BILL HENNINK AND BILL BONVANIE 1228
- Bargaining Unit - Certification - Pre-Hearing Vote - Panel not adopting the bargaining unit description agreed to by the applicant and respondent as the voting constituency - Use of the phrase "save and except persons in bargaining units for which any trade union held bargaining rights as of..." inappropriate - Incumbent had not agreed to this bargaining unit description which deviates from that in the incumbent's collective agreement - Incumbent's bargaining unit description adopted minus language referring to employees of contractors engaged by the respondent - Vote ordered
- LECOURS LUMBER COMPANY LIMITED; RE I.W.A. 1286
- Certification - Abandonment - Collective Agreement - Trade Union Status - Applicant arguing intervener had lost its trade union status by ignoring its constitution for several years -

Intervener found to not entirely have abandoned its constitution - Not ceasing to operate as a trade union - Intervener not having abandoned its bargaining rights through inactivity - Foreman not involved in the administration of the union so as to deem agreement not to be a collective agreement - Collective agreement between intervener and respondent constituting a bar to the certification application

L'ABBE CONSTRUCTION (ONTARIO) LTD.; RE L.I.U.N.A., LOCAL 527; RE CANADIAN CONSTRUCTION, BUILDING MAINTENANCE AND GENERAL WORKERS' UNION (N.C.C.L.) 1191

Certification - Bargaining Rights - Construction Industry - Parties - Practice and Procedure - Employer seeking to resile from agreement on employee list and revert to earlier position - Inappropriate for Board to permit employer to resile - Labourers' Union seeking to intervene in carpenters application on the basis that it represented all construction employees of the employer pursuant to a collective agreement between it and the Housing Labour Bureau - Labourers' Union denied intervener status on basis of collective agreement which does not cover carpenters - Labourers' Union granted status to intervene based on membership evidence submitted on date of hearing - Labour relations officer appointed

RUNNYMEDE DEVELOPMENT CORPORATION LIMITED; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183 1305

Certification - Bargaining Unit - Construction Industry - Representation Vote - Whether appropriate to include steamfitters in plumbers unit when separate certified trades and employer not employing any steamfitters - Standard unit including steamfitters granted - Irrelevant whether there are employees in all the classifications used to describe that standard unit - Board exercising its discretion to order a representation vote because of improper union conduct

D.E. WITMER PLUMBING AND HEATING LIMITED; RE U.A., LOCAL 527; RE GROUP OF EMPLOYEES; RE BILL HENNINK AND BILL BONVANIE 1228

Certification - Bargaining Unit - Pre-Hearing Vote - Panel not adopting the bargaining unit description agreed to by the applicant and respondent as the voting constituency - Use of the phrase "save and except persons in bargaining units for which any trade union held bargaining rights as of..." inappropriate - Incumbent had not agreed to this bargaining unit description which deviates from that in the incumbent's collective agreement - Incumbent's bargaining unit description adopted minus language referring to employees of contractors engaged by the respondent - Vote ordered

LECOURS LUMBER COMPANY LIMITED; RE I.W.A. 1286

Certification - Bargaining Unit - Whether graduate and registered nurses should be excluded from an all employee nursing home service unit on basis of community of interest or past practice - Board not prepared to conclude that past practice in hospital sector should be applied to nursing home sector - Past practice in nursing home sector ambiguous - Respondent making no submissions with respect to community of interest factors - Board determining that all employee unit viable

KING NURSING HOME LTD.; RE C.L.A.C. 1257

Certification - Collective Agreement - Whether collective agreement between intervener and respondent constituting a bar to applicant's certification - Board's consent not obtained for early termination of prior agreement - Two agreements covering some of the same employees contrary to Act - Second agreement cannot function as a bar

LAIDLAW WASTE SYSTEMS LTD.; RE TEAMSTERS' UNION, LOCAL 419; RE L.I.U.N.A., OIL AND GAS TECHNICIANS, SERVICE, DOMESTIC & GENERAL WORKERS UNION, LOCAL 1267 1267

Certification - Construction Industry - Employer - Respondent providing construction project management services to owner of project - Order for casual labourers made by owner but persons put to work and paid by construction project manager - Construction project manager the employer for purposes of the Act - Certificates issuing ANGUS J. MACKINNON CONSULTANTS LIMITED, A.J. MACKINNON & ASSOCIATES; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL.....	1204
Certification - Construction Industry - Evidence - Practice and Procedure - Challenge to officer's ruling that respondent limited to introducing evidence relating to the work of the employees on the application date - Appropriate time for dealing with such matters is after the officer's report is received - Officer directed to continue with enquiry STRONGLAND CONSTRUCTION LTD.; RE C.J.A., LOCAL 27	1330
Certification - Construction Industry - Petition - Document bearing foreman's signature and signed at the request of the foreman not a voluntary statement of desire - Certificates issuing THORNTON SAND & GRAVEL LIMITED; RE L.I.U.N.A., LOCAL 1059; RE GROUP OF EMPLOYEES	1331
Certification - Construction Industry - Practice and Procedure - Request for hearing by respondent denied - Short duration of employment not relevant to Board's considerations - Certificates issuing BLACK & MCDONALD LIMITED; RE S.M.W.	1208
Certification - Construction Industry - Practice and Procedure - Reconsideration - Counsel for respondent not attending certification hearing - Board certifying union - Respondent requesting reconsideration - Respondent erroneously assuming that hearing would be adjourned based on conversation with Registrar in which Registrar told respondent to write in if it wished to amend its reply - Board denying reconsideration - Notice of hearing clearly setting out consequences of not attending hearing - Absence of counsel through his own false assumptions not a ground for reconsidering decision SAULT STE. MARIE, THE CORPORATION OF THE CITY OF; RE L.I.U.N.A., LOCAL 1036; RE R.E. MORCAN, C.U.P.E.; RE C.J.A., LOCAL 446.....	1319
Certification - Construction Industry - Practice and Procedure - Respondent requesting a hearing on basis that certification will cause him hardship - Hearing denied - Certificates issuing J.C. ELECTRIC, JOHN ANTHONY WAITE C.O.B. AS; RE I.B.E.W., LOCAL 1687...	1251
Certification - Construction Industry - Practice and Procedure - Pre-Hearing Vote - No one voting at pre-hearing representation vote conducted at construction site - Applicant conducting no investigation concerning lack of voters nor contacting Board - Three months later applicant's counsel requesting new vote - Objection to vote untimely - Factual basis of objection had come to the attention of the applicant before the deadline for making objections had passed - Certification application dismissed NIMEL CONSTRUCTION LIMITED; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183	1299
Certification - Construction Industry - Whether persons employed as construction labourers on the application date - Three of four persons in dispute found not to be employed as construction labourers on the application date - Certificates issuing DARROW DEVELOPMENTS LTD.; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL	1238
Certification - Evidence - Reconsideration - Balancing of interests requiring production of docu-	

IV

ments - Documents that are arguably relevant must be produced - Decision to produce documents confirmed	
MOLLENHAUER LIMITED; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183; RE M.T.A.B.A.; RE ELLIS-DON LIMITED; RE THE FORM WORK COUNCIL OF ONTARIO; RE MILNE & NICHOLLS LTD.	1294
Certification - Membership Evidence - Practice and Procedure - Earlier decision varied - Respondent not permitted to add further name to employee list when list already amended three times - Incomplete dates on membership cards cured by <i>viva voce</i> evidence - Possible ambiguity in documentary evidence concerning whether application one for membership in local or international not fatal because, as a whole, the evidence points unequivocally to membership in the applicant - Certificates issuing	
MENKES DEVELOPMENTS INC.; RE L.I.U.N.A., LOCAL 506; RE L.I.U.N.A., LOCAL 183	1290
Certification - Parties - Practice and Procedure - Applicant requesting hearing to determine status of intervener prior to officer examinations - Issues of law to be dealt with after officer has reported to Board - Officer ordered to continue with enquiry	
HOLLINGWORTH DRAIN SERVICES; RE C.J.A., LOCAL 27	1250
Certification - Practice and Procedure - Pre-Hearing Vote - Employees involved in these applications among those whose inclusion in the unit is in dispute in another case where pre-hearing vote has been held and ballot box sealed - Whether these applications should be postponed pending the outcome of that case, consolidated for hearing with that case pursuant to s.103(3), or processed by ordering a pre-hearing vote as originally applied for - S.103(3) decision deferred and pre-hearing vote ordered	
KIROUAC CONTRACTING LTD.; RE I.W.A.; RE LUMBER AND SAWMILL WORKERS UNION, LOCAL 2693 OF THE C.J.A.; RE C.P.U.	1262
Certification - Practice and Procedure - Reconsideration - Unfair Labour Practice - Reconsideration of Board decision not to consolidate representation and unfair labour practice complaints - Purpose and effect of consolidation reviewed - Ordered that matters be heard together but not consolidated	
DRESSER CANADA, INC.; RE CAW; RE GROUP OF EMPLOYEES; RE U.S.W.A. .	1243
Certification - Pre-Hearing Vote - Voting constituency where only one employee in one of the two units the incumbent union represents - Single voting constituency combining two units appropriate - Each ballot to be segregated - Preliminary objection to timeliness of application to be dealt with after vote - Challenge to bargaining rights of applicant not entertained because no termination application before the Board	
WIRE ROPE INDUSTRIES LTD.; RE I.W.A.; RE LUMBER AND SAWMILL WORKERS' UNION, LOCAL 2693 OF THE C.J.A.	1336
Certification - Trade Union Status - Whether local chartered by CLC is a trade union - When charter granted, the contractual relationship necessary was created - No evidence that employees confused about what they were joining - Applicant found to be a trade union - Vote ordered	
LAVAL TOOL & MOULD INC.; RE WINDSOR MOULDMAKERS UNION, LOCAL 1680, C.L.C.; RE GROUP OF EMPLOYEES	1281
Charter of Rights and Freedoms - Termination - Timeliness - Application for termination made after the appointment of a conciliation officer - Argument rejected that trade union has an obligation to advise the employees in the unit of its intention to apply for the appointment of a conciliation officer because that cuts off open period for termination applications -	

Charter argument relating to freedom of association not entertained because Attorneys General had not been notified - Termination application dismissed as untimely

CONNIE STEEL PRODUCTS LIMITED; RE LEONARDO DEPRETE, ET AL.; RE B.S.O.I.W., SHOPMEN'S LOCAL UNION NO. 834 1225

Collective Agreement - Abandonment - Certification - Trade Union Status - Applicant arguing intervenor had lost its trade union status by ignoring its constitution for several years - Intervenor found to not entirely have abandoned its constitution - Not ceasing to operate as a trade union - Intervenor not having abandoned its bargaining rights through inactivity - Foreman not involved in the administration of the union so as to deem agreement not to be a collective agreement - Collective agreement between intervenor and respondent constituting a bar to the certification application

L'ABBE CONSTRUCTION (ONTARIO) LTD.; RE L.I.U.N.A., LOCAL 527; RE CANADIAN CONSTRUCTION, BUILDING MAINTENANCE AND GENERAL WORKERS' UNION (N.C.C.L.) 1191

Collective Agreement - Certification - Whether collective agreement between intervenor and respondent constituting a bar to applicant's certification - Board's consent not obtained for early termination of prior agreement - Two agreements covering some of the same employees contrary to Act - Second agreement cannot function as a bar

LIDLAW WASTE SYSTEMS LTD.; RE TEAMSTERS' UNION, LOCAL 419; RE L.I.U.N.A., OIL AND GAS TECHNICIANS, SERVICE, DOMESTIC & GENERAL WORKERS UNION, LOCAL 1267 1267

Collective Agreement - Reference - Collective agreement between federally certified union and employer purporting to bind successors - Employer becoming bankrupt and provincially regulated employer receiving federally regulated employer's operating authority - Whether union successor rights created by agreement - Parties cannot by the collective agreement bind a third party to their contract - No applicable successor rights legislation - Arbitrator should not be appointed by Minister because no collective agreement in force

BEACON TRANSIT LINES INCORPORATED; RE TEAMSTERS' UNION, LOCAL 938 1206

Construction Industry - Bargaining Rights - Certification - Parties - Practice and Procedure - Employer seeking to resile from agreement on employee list and revert to earlier position - Inappropriate for Board to permit employer to resile - Labourers' Union seeking to intervene in carpenters application on the basis that it represented all construction employees of the employer pursuant to a collective agreement between it and the Housing Labour Bureau - Labourers' Union denied intervenor status on basis of collective agreement which does not cover carpenters - Labourers' Union granted status to intervene based on membership evidence submitted on date of hearing - Labour relations officer appointed

RUNNYMEDE DEVELOPMENT CORPORATION LIMITED; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183 1305

Construction Industry - Bargaining Unit - Certification - Representation Vote - Whether appropriate to include steamfitters in plumbers unit when separate certified trades and employer not employing any steamfitters - Standard unit including steamfitters granted - Irrelevant whether there are employees in all the classifications used to describe that standard unit - Board exercising its discretion to order a representation vote because of improper union conduct

D.E. WITMER PLUMBING AND HEATING LIMITED; RE U.A., LOCAL 527; RE GROUP OF EMPLOYEES; RE BILL HENNINK AND BILL BONVANIE 1228

Construction Industry - Certification - Employer - Respondent providing construction project

management services to owner of project - Order for casual labourers made by owner but persons put to work and paid by construction project manager - Construction project manager the employer for purposes of the Act - Certificates issuing	
ANGUS J. MACKINNON CONSULTANTS LIMITED, A.J. MACKINNON & ASSOCIATES; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL.....	1204
Construction Industry - Certification - Evidence - Practice and Procedure - Challenge to officer's ruling that respondent limited to introducing evidence relating to the work of the employees on the application date - Appropriate time for dealing with such matters is after the officer's report is received - Officer directed to continue with enquiry	
STRONGLAND CONSTRUCTION LTD.; RE C.J.A., LOCAL 27	1330
Construction Industry - Certification - Petition - Document bearing foreman's signature and signed at the request of the foreman not a voluntary statement of desire - Certificates issuing	
THORNTON SAND & GRAVEL LIMITED; RE L.I.U.N.A., LOCAL 1059; RE GROUP OF EMPLOYEES	1331
Construction Industry - Certification - Practice and Procedure - Reconsideration - Counsel for respondent not attending certification hearing - Board certifying union - Respondent requesting reconsideration - Respondent erroneously assuming that hearing would be adjourned based on conversation with Registrar in which Registrar told respondent to write in if it wished to amend its reply - Board denying reconsideration - Notice of hearing clearly setting out consequences of not attending hearing - Absence of counsel through his own false assumptions not a ground for reconsidering decision	
SAULT STE. MARIE, THE CORPORATION OF THE CITY OF; RE L.I.U.N.A., LOCAL 1036; RE R.E. MORCAN, C.U.P.E.; RE C.J.A., LOCAL 446.....	1319
Construction Industry - Certification - Practice and Procedure - Request for hearing by respondent denied - Short duration of employment not relevant to Board's considerations - Certificates issuing	
BLACK & MCDONALD LIMITED; RE S.M.W.....	1208
Construction Industry - Certification - Practice and Procedure - Respondent requesting a hearing on basis that certification will cause him hardship - Hearing denied - Certificates issuing	
J.C. ELECTRIC, JOHN ANTHONY WAITE C.O.B. AS; RE I.B.E.W., LOCAL 1687...	1251
Construction Industry - Certification - Practice and Procedure - Pre-Hearing Vote - No one voting at pre-hearing representation vote conducted at construction site - Applicant conducting no investigation concerning lack of voters nor contacting Board - Three months later applicant's counsel requesting new vote - Objection to vote untimely - Factual basis of objection had come to the attention of the applicant before the deadline for making objections had passed - Certification application dismissed	
NIMEL CONSTRUCTION LIMITED; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183	1299
Construction Industry - Certification - Whether persons employed as construction labourers on the application date - Three of four persons in dispute found not to be employed as a construction labourer on the application date - Certificates issuing	
DARROW DEVELOPMENTS LTD.; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL	1238
Duty of Fair Representation - Practice and Procedure - Unfair Labour Practice - Whether complaint should be dismissed on the basis of delay of approximately two years - Delay caused	

by lack of sophistication, need to obtain legal aid, and change of solicitors - Delay may be taken into account in respect of remedy - Board declining to dismiss complaint - Further hearings scheduled

HINKSON, GEORGE; RE CANADIAN CONFERENCE OF TEAMSTERS, CHEMICAL, ENERGY & ALLIED WORKERS DIVISION, LOCAL 2177; RE BASF INMONT CANADA INC. 1246

Duty of Fair Representation - Unfair Labour Practice - Complainant represented at an arbitration hearing by a union staff representative - Discharge upheld - Union not breaching duty by not hiring a lawyer for arbitration - Complaint dismissed

BLAIR, WINSTON ALFONSO; RE U.S.W.A.; RE MIDAS CANADA INC. AND INTERNATIONAL PARTS MANUFACTURING LIMITED 1211

Employee Reference - Practice and Procedure - Agreement by parties on employee list during certification process - Whether union can bring an employee reference for an individual who was not on schedules - An agreement that a person is not within the unit, or on the schedules, is not necessarily an agreement that the person is not an employee because s/he exercises managerial functions - No agreement on employee status - Officer appointed

ROYAL MATTRESS MFG. CO.; RE U.F.C.W. 1302

Employee Reference - Whether persons performing a mixed job of "security guard" and clerk employed as "guards" within the meaning of the Act - Actual duties never placing persons in position of possible conflict of interest with other employees - Board finding that persons not employed as guards

KIMBERLY CLARK OF CANADA LTD.; RE LUMBER AND SAWMILL WORKERS' UNION, LOCAL 2693 1255

Employer - Certification - Construction Industry - Respondent providing construction project management services to owner of project - Order for casual labourers made by owner but persons put to work and paid by construction project manager - Construction project manager the employer for purposes of the Act - Certificates issuing

ANGUS J. MACKINNON CONSULTANTS LIMITED, A.J. MACKINNON & ASSOCIATES; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL 1204

Evidence - Certification - Construction Industry - Practice and Procedure - Challenge to officer's ruling that respondent limited to introducing evidence relating to the work of the employees on the application date - Appropriate time for dealing with such matters is after the officer's report is received - Officer directed to continue with enquiry

STRONGLAND CONSTRUCTION LTD.; RE C.J.A., LOCAL 27 1330

Evidence - Certification - Reconsideration - Balancing of interests requiring production of documents - Documents that are arguably relevant must be produced - Decision to produce documents confirmed

MOLLENHAUER LIMITED; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183; RE M.T.A.B.A.; RE ELLIS-DON LIMITED; RE THE FORM WORK COUNCIL OF ONTARIO; RE MILNE & NICHOLLS LTD. 1294

First Contract Arbitration - Union certified pursuant to s.8 following employer unfair labour practices - Employer refusing to provide the union, when requested, with the names, addresses, telephone numbers and hourly rates of the employees in the unit - Employer resisting a union security clause for more than 15 months - Failure of communication between employer's representative at the bargaining table and the decision-maker who was

VIII

not at the table - Process of collective bargaining unsuccessful for reasons set out in s.40a(2)(a), (b) and (c) - Direction to settle first collective agreement by arbitration	
CO-FO CONCRETE FORMING CONSTRUCTION LIMITED; RE L.I.U.N.A., LOCAL 1059.....	1213
Membership Evidence - Certification - Practice and Procedure - Earlier decision varied - Respondent not permitted to add further name to employee list when list already amended three times - Incomplete dates on membership cards cured by <i>viva voce</i> evidence - Possible ambiguity in documentary evidence concerning whether application one for membership in local or international not fatal because, as a whole, the evidence points unequivocally to membership in the applicant - Certificates issuing	
MENKES DEVELOPMENTS INC.; RE L.I.U.N.A., LOCAL 506; RE L.I.U.N.A., LOCAL 183.....	1290
Parties - Bargaining Rights - Certification - Construction Industry - Practice and Procedure - Employer seeking to resile from agreement on employee list and revert to earlier position - Inappropriate for Board to permit employer to resile - Labourers' Union seeking to intervene in carpenters application on the basis that it represented all construction employees of the employer pursuant to a collective agreement between it and the Housing Labour Bureau - Labourers' Union denied intervener status on basis of collective agreement which does not cover carpenters - Labourers' Union granted status to intervene based on membership evidence submitted on date of hearing - Labour relations officer appointed	
RUNNYMEDE DEVELOPMENT CORPORATION LIMITED; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183.....	1305
Parties - Certification - Practice and Procedure - Applicant requesting hearing to determine status of intervener prior to officer examinations - Issues of law to be dealt with after officer has reported to Board - Officer ordered to continue with enquiry	
HOLLINGWORTH DRAIN SERVICES; RE C.J.A., LOCAL 27	1250
Petition - Certification - Construction Industry - Document bearing foreman's signature and signed at the request of the foreman not a voluntary statement of desire - Certificates issuing	
THORNTON SAND & GRAVEL LIMITED; RE L.I.U.N.A., LOCAL 1059; RE GROUP OF EMPLOYEES	1331
Practice and Procedure - Bargaining Rights - Certification - Construction Industry - Parties - Employer seeking to resile from agreement on employee list and revert to earlier position - Inappropriate for Board to permit employer to resile - Labourers' Union seeking to intervene in carpenters application on the basis that it represented all construction employees of the employer pursuant to a collective agreement between it and the Housing Labour Bureau - Labourers' Union denied intervener status on basis of collective agreement which does not cover carpenters - Labourers' Union granted status to intervene based on membership evidence submitted on date of hearing - Labour relations officer appointed	
RUNNYMEDE DEVELOPMENT CORPORATION LIMITED; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183.....	1305
Practice and Procedure - Certification - Construction Industry - Evidence - Challenge to officer's ruling that respondent limited to introducing evidence relating to the work of the employees on the application date - Appropriate time for dealing with such matters is after the officer's report is received - Officer directed to continue with enquiry	
STRONGLAND CONSTRUCTION LTD.; RE C.J.A., LOCAL 27	1330
Practice and Procedure - Certification - Construction Industry - Request for hearing by respon-	

dent denied - Short duration of employment not relevant to Board's considerations - Certificate issuing	
BLACK & MCDONALD LIMITED; RE S.M.W.	1208
Practice and Procedure - Certification - Construction Industry - Respondent requesting a hearing on basis that certification will cause him hardship - Hearing denied - Certificates issuing	
J.C. ELECTRIC, JOHN ANTHONY WAITE C.O.B. AS; RE I.B.E.W., LOCAL 1687 ...	1251
Practice and Procedure - Certification - Membership Evidence - Earlier decision varied - Respondent not permitted to add further name to employee list when list already amended three times - Incomplete dates on membership cards cured by <i>viva voce</i> evidence - Possible ambiguity in documentary evidence concerning whether application one for membership in local or international not fatal because, as a whole, the evidence points unequivocally to membership in the applicant - Certificates issuing	
MENKES DEVELOPMENTS INC.; RE L.I.U.N.A., LOCAL 506; RE L.I.U.N.A., LOCAL 183	1290
Practice and Procedure - Certification - Parties - Applicant requesting hearing to determine status of intervener prior to officer examinations - Issues of law to be dealt with after officer has reported to Board - Officer ordered to continue with enquiry	
HOLLINGWORTH DRAIN SERVICES; RE C.J.A., LOCAL 27	1250
Practice and Procedure - Certification - Pre-Hearing Vote - Employees involved in these applications among those whose inclusion in the unit is in dispute in another case where pre-hearing vote has been held and ballot box sealed - Whether these applications should be postponed pending the outcome of that case, consolidated for hearing with that case pursuant to s.103(3), or processed by ordering a pre-hearing vote as originally applied for - S.103(3) decision deferred and pre-hearing vote ordered	
KIROUAC CONTRACTING LTD.; RE I.W.A.; RE LUMBER AND SAWMILL WORKERS UNION, LOCAL 2693 OF THE C.J.A.; RE C.P.U.	1262
Practice and Procedure - Certification - Reconsideration - Unfair Labour Practice - Reconsideration of Board decision not to consolidate representation and unfair labour practice complaints - Purpose and effect of consolidation reviewed - Order that matters be heard together but not consolidated	
DRESSER CANADA INC.; RE CAW; RE GROUP OF EMPLOYEES; RE U.S.W.A. ..	1243
Practice and Procedure - Certification - Construction Industry - Pre-Hearing Vote - No one voting at pre-hearing representation vote conducted at construction site - Applicant conducting no investigation concerning lack of voters nor contacting Board - Three months later applicant's counsel requesting new vote - Objection to vote untimely - Factual basis of objection had come to the attention of the applicant before the deadline for making objections had passed - Certification application dismissed	
NIMEL CONSTRUCTION LIMITED; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183	1299
Practice and Procedure - Certification - Construction Industry - Reconsideration - Counsel for respondent not attending certification hearing - Board certifying union - Respondent requesting reconsideration - Respondent erroneously assuming that hearing would be adjourned based on conversation with Registrar in which Registrar told respondent to write in if it wished to amend its reply - Board denying reconsideration - Notice of hearing clearly	

setting out consequences of not attending hearing - Absence of counsel through his own false assumptions not a ground for reconsidering decision

SAULT STE. MARIE, THE CORPORATION OF THE CITY OF; RE L.I.U.N.A.,
LOCAL 1036; RE R.E. MORCAN, C.U.P.E.; RE C.J.A., LOCAL 446.....

1319

Practice and Procedure - Duty of Fair Representation - Unfair Labour Practice - Whether complaint should be dismissed on the basis of delay of approximately two years - Delay caused by lack of sophistication, need to obtain legal aid, and change of solicitors - Delay may be taken into account in respect of remedy - Board declining to dismiss complaint - Further hearings scheduled

HINKSON, GEORGE; RE CANADIAN CONFERENCE OF TEAMSTERS, CHEMICAL, ENERGY & ALLIED WORKERS DIVISION, LOCAL 2177; RE BASF INMONT CANADA INC.....

1246

Practice and Procedure - Employee Reference - Agreement by parties on employee list during certification process - Whether union can bring an employee reference for an individual who was not on schedules - An agreement that a person is not within the unit, or on the schedules, is not/necessarily an agreement that the person is not an employee because s/he exercises managerial functions - No agreement on employee status - Officer appointed

ROYAL MATTRESS MFG. CO.; RE U.F.C.W.

1302

Pre-Hearing Vote - Bargaining Unit - Certification - Panel not adopting the bargaining unit description agreed to by the applicant and respondent as the voting constituency - Use of the phrase "save and except persons in bargaining units for which any trade union held bargaining rights as of..." inappropriate - Incumbent had not agreed to this bargaining unit description which deviates from that in the incumbent's collective agreement - Incumbent's bargaining unit description adopted minus language referring to employees of contractors engaged by the respondent - Vote ordered

LECOURS LUMBER COMPANY LIMITED; RE I.W.A.

1286

Pre-Hearing Vote - Certification - Construction Industry - Practice and Procedure - No one voting at pre-hearing representation vote conducted at construction site - Applicant conducting no investigation concerning lack of voters nor contacting Board - Three months later applicant's counsel requesting new vote - Objection to vote untimely - Factual basis of objection had come to the attention of the applicant before the deadline for making objections had passed - Certification application dismissed

NIMEL CONSTRUCTION LIMITED; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183

1299

Pre-Hearing Vote - Certification - Practice and Procedure - Employees involved in these applications among those whose inclusion in the unit is in dispute in another case where pre-hearing vote has been held and ballot box sealed - Whether these applications should be postponed pending the outcome of that case, consolidated for hearing with that case, or processed by ordering a pre-hearing vote as originally applied for - S.103(3) decision deferred and pre-hearing vote ordered

KIROUAC CONTRACTING LTD.; RE I.W.A.; RE LUMBER AND SAWMILL WORKERS UNION, LOCAL 2693 OF THE C.J.A.; RE C.P.U.

1262

Pre-Hearing Vote - Certification - Voting constituency where only one employee in one of the two units the incumbent union represents - Single voting constituency combining two units appropriate - Each ballot to be segregated - Preliminary objection to timeliness of appli-

<p>cation to be dealt with after vote - Challenge to bargaining rights of applicant not entertained because no termination application before the Board</p> <p>WIRE ROPE INDUSTRIES LTD.; RE I.W.A.; RE LUMBER AND SAWMILL WORKERS' UNION, LOCAL 2693 OF THE C.J.A.</p>	1336
<p>Reconsideration - Certification - Construction Industry - Practice and Procedure - Counsel for respondent not attending certification hearing - Board certifying union - Respondent requesting reconsideration - Respondent erroneously assuming that hearing would be adjourned based on conversation with Registrar in which Registrar told respondent to write in if it wished to amend its reply - Board denying reconsideration - Notice of hearing clearly setting out consequences of not attending hearing - Absence of counsel through his own false assumptions not a ground for reconsidering decision</p> <p>SAULT STE. MARIE, THE CORPORATION OF THE CITY OF; RE L.I.U.N.A., LOCAL 1036; RE R.E. MORCAN, C.U.P.E.; RE C.J.A., LOCAL 446</p>	1319
<p>Reconsideration - Certification - Evidence - Balancing of interests requiring production of documents - Documents that are arguably relevant must be produced - Decision to produce documents confirmed</p> <p>MOLLENHAUER LIMITED; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183; RE M.T.A.B.A.; RE ELLIS-DON LIMITED; RE THE FORM WORK COUNCIL OF ONTARIO; RE MILNE & NICHOLLS LTD.</p>	1294
<p>Reconsideration - Certification - Practice and Procedure - Unfair Labour Practice - Reconsideration of Board decision not to consolidate representation and unfair labour practice complaints - Purpose and effect of consolidation reviewed - Order that matters be heard together but not consolidated</p> <p>DRESSER CANADA, INC.; RE CAW; RE GROUP OF EMPLOYEES; RE U.S.W.A. .</p>	1243
<p>Reference - Collective Agreement - Collective agreement between federally certified union and employer purporting to bind successors - Employer becoming bankrupt and provincially regulated employer receiving federally regulated employer's operating authority - Whether union successor rights created by agreement - Parties cannot by the collective agreement bind a third party to their contract - No applicable successor rights legislation - Arbitrator should not be appointed by Minister because no collective agreement in force</p> <p>BEACON TRANSIT LINES INCORPORATED; RE TEAMSTERS' UNION, LOCAL 938</p>	1206
<p>Remedies - Strike - Employer told that plumbers would not work until labourer removed from work site - Board finding threat of illegal strike - Request for order directing employer to cease and desist from refusing to employ the labourer denied - Employer free to decide who should perform the disputed work</p> <p>NIAGARA MECHANICAL CONTRACTORS LIMITED, U.A., LOCAL 46 AND CHRIS THURROTT; RE L.I.U.N.A., LOCAL 506</p>	1295
<p>Representation Vote - Bargaining Unit - Whether appropriate to include steamfitters in plumbers unit when separate certified trades and employer not employing any steamfitters - Standard unit including steamfitters granted - Irrelevant whether there are employees in all the classifications used to describe that standard unit - Board exercising its discretion to order a representation vote because of improper union conduct</p> <p>D.E. WITMER PLUMBING AND HEATING LIMITED; RE U.A., LOCAL 527; RE GROUP OF EMPLOYEES; RE BILL HENNINK AND BILL BONVANIE</p>	1228
<p>Settlement - Unfair Labour Practice - Complainant signing minutes of settlement providing for withdrawal of complaint upon cash payment - Later claiming that settlement not legally</p>	

XII

binding because she was not represented by counsel and because of the consequences of the agreement - Party not allowed to repudiate a settlement because it falls short of what legal counsel may have obtained - Complaint withdrawn in accordance with the minutes of settlement	
LAMBTON COUNTY BOARD OF EDUCATION, THE, C.U.P.E., LOCAL 1019 AND; RE BETTY JEAN LUNO	1277
Strike - Remedies - Employer told that plumbers would not work until labourer removed from work site - Board finding threat of illegal strike - Request for order directing employer to cease and desist from refusing to employ the labourer denied - Employer free to decide who should perform the disputed work	
NIAGARA MECHANICAL CONTRACTORS LIMITED, U.A., LOCAL 46 AND CHRIS THURROTT; RE L.I.U.N.A., LOCAL 506	1295
Termination - Charter of Rights and Freedoms - Timeliness - Application for termination made after the appointment of a conciliation officer - Argument rejected that trade union has an obligation to advise the employees in the unit of its intention to apply for the appointment of a conciliation officer because that cuts off open period for termination applications - Charter argument relating to freedom of association not entertained because Attorneys General had not been notified - Termination application dismissed as untimely	
CONNIE STEEL PRODUCTS LIMITED; RE LEONARDO DELPRETE, ET AL.; RE B.S.O.I.W., SHOPMEN'S LOCAL UNION NO. 834	1225
Timeliness - Charter of Rights and Freedoms - Termination - Application for termination made after the appointment of a conciliation officer - Argument that trade union has an obligation to advise the employees in the unit of its intention to apply for the appointment of a conciliation officer because that cuts off open period for termination applications rejected - Charter argument relating to freedom of association not entertained because Attorneys General had not been notified - Termination application dismissed as untimely	
CONNIE STEEL PRODUCTS LIMITED; RE LEONARDO DELPRETE, ET AL.; RE B.S.O.I.W., SHOPMEN'S LOCAL UNION NO. 834	1225
Trade Union Status - Abandonment - Certification - Collective Agreement - Applicant arguing intervenor had lost its trade union status by ignoring its constitution for several years - Intervenor found to not entirely have abandoned its constitution - Not ceasing to operate as a trade union - Intervenor not having abandoned its bargaining rights through inactivity - Foreman not involved in the administration of the union so as to deem agreement not to be a collective agreement - Collective agreement between intervenor and respondent constituting a bar to the certification application	
L'ABBE CONSTRUCTION (ONTARIO) LTD.; RE L.I.U.N.A., LOCAL 527; RE CANADIAN CONSTRUCTION, BUILDING MAINTENANCE AND GENERAL WORKERS' UNION (N.C.C.L.)	1191
Trade Union Status - Certification - Whether local chartered by CLC is a trade union - When charter granted, the contractual relationship necessary was created - No evidence that employees confused about what they were joining - Applicant found to be a trade union - Vote ordered	
LAVAL TOOL & MOULD INC.; RE WINDSOR MOULDMAKERS UNION, LOCAL 1680, C.L.C.; RE GROUP OF EMPLOYEES	1281
Unfair Labour Practice - Certification - Practice and Procedure - Reconsideration - Reconsideration of Board decision not to consolidate representation and unfair labour practice com-	

<p>plaints - Purpose and effect of consolidation reviewed - Order that matters be heard together but not consolidated</p> <p>DRESSER CANADA, INC.; RE CAW; RE GROUP OF EMPLOYEES; RE U.S.W.A. .</p>	1243
<p>Unfair Labour Practice - Duty of Fair Representation - Complainant represented at an arbitration hearing by a union staff representative - Discharge upheld - Union not breaching duty by not hiring a lawyer for arbitration - Complaint dismissed</p> <p>BLAIR, WINSTON ALFONSO; RE U.S.W.A.; RE MIDAS CANADA INC. AND INTERNATIONAL PARTS MANUFACTURING LIMITED</p>	1211
<p>Unfair Labour Practice - Duty of Fair Representation - Practice and Procedure - Whether complaint should be dismissed on the basis of delay of approximately two years - Delay caused by lack of sophistication, need to obtain legal aid, and change of solicitors - Delay may be taken into account in respect of remedy - Board declining to dismiss complaint - Further hearings scheduled</p> <p>HINKSON, GEORGE; RE CANADIAN CONFERENCE OF TEAMSTERS, CHEMICAL, ENERGY & ALLIED WORKERS DIVISION, LOCAL 2177; RE BASF INMONT CANADA INC.....</p>	1246
<p>Unfair Labour Practice - Settlement - Complainant signing minutes of settlement providing for withdrawal of complaint upon cash payment - Later claiming that settlement not legally binding because she was not represented by counsel and because of the consequences of the agreement - Party not allowed to repudiate a settlement because it falls short of what legal counsel may have obtained - Complaint withdrawn in accordance with the minutes of settlement</p> <p>LAMBTON COUNTY BOARD OF EDUCATION, THE, C.U.P.E., LOCAL 1019 AND; RE BETTY JEAN LUNO</p>	1277

2284-86-R Labourers' International Union of North America, Local 527, Applicant v. **L'Abbe Construction (Ontario) Ltd.**, Respondent v. Canadian Construction, Building Maintenance and General Workers' Union, (N.C.C.L.), Intervener

Abandonment - Certification - Collective Agreement - Trade Union Status - Applicant arguing intervener had lost its trade union status by ignoring its constitution for several years - Intervener found to not entirely have abandoned its constitution - Not ceasing to operate as a trade union - Intervener not having abandoned its bargaining rights through inactivity - Foreman not involved in the administration of the union so as to deem agreement not to be a collective agreement - Collective agreement between intervener and respondent constituting a bar to the certification application

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *W. H. Wightman* and *J. Redshaw*.

APPEARANCES: *L. Steinberg*, *M. Martins* and *G. Mullin* for the applicant; *Francois L'Abbe* and *Michael S. Ruddy* for the respondent; *Paul A. Webber*, *Heather Hobart* and *Clive Thomas* for the intervener.

DECISION OF G. T. SURDYKOWSKI, VICE-CHAIR, AND BOARD MEMBER W. H. WIGHTMAN; October 23, 1987

1. By decision dated December 23, 1986, a differently constituted panel of the Board dealt with three preliminary issues relating to the applicant's assertion that the Canadian, Construction, Building Maintenance and General Workers' Union (NCCL) (hereinafter the "Canadian Construction Union"), which filed an intervention, is not entitled to participate in these proceedings. Subsequently, a hearing was held in Ottawa with respect to the applicant's assertion that:

- (a) the Canadian Construction Union, though once a trade union, is no longer one within the meaning of the *Labour Relations Act* and that the agreement between it and the respondent is therefor not a collective agreement within the meaning of the *Labour Relations Act* and, accordingly, cannot constitute a bar to this application;
- (b) the Canadian Construction Union has abandoned any bargaining rights that it may have held with respect to employees of the respondent who were affected by this application, and that the agreement purported to be a collective agreement between the Canadian Construction Union and the respondent is not one and therefore cannot constitute a bar to this application;
- (c) the respondent has been involved with the Canadian Construction Union in a manner that is contrary to clause (a) of section 48 of the Act and that the agreement between them must therefore be deemed not to be a collective agreement for purposes of the Act.

In essence, the applicant submits that the Canadian Construction Union is neither a "real" trade union, nor has it acted like one.

A. TRADE UNION "STATUS"

2. An organization is a "trade union" if it fits the definition in section 1(1)(p) of the

Labour Relations Act. “Status” as a trade union merely connotes that an organization has been found by the Board to be a trade union (see *Board of Education for the City of York* (“York No. 1”), [1984] OLRB Rep. Sept. 1279). As indicated at paragraph 6 of the Board’s decision dated December 23, 1986 in this matter, the Canadian Construction Union has been determined by the Board to be a trade union within the meaning of the Act on at least two prior occasions: *Pillar Construction Limited*, (unreported decision dated July 3, 1969 in Board File No. 16321-69-R) and *L’Abbe Construction (Ontario) Ltd.* (unreported decision dated February 8, 1974 in Board File No. 5024-73-R). In the latter case, the Canadian Construction Union was certified as the exclusive bargaining agent for all carpenters, carpenters’ apprentices and construction labourers in the employ of the respondent in what is Board Area 15, save and except non-working foremen and persons above the rank of non-working foreman. Subsequently, the Canadian Construction Union entered into a number of agreements with the respondent, the most recent of which is said, by the Canadian Construction Union and the respondent, to be a collective agreement which is a bar to this application.

3. Section 1(1)(p) of the *Labour Relations Act* provides that:

“trade union” means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency.

In determining whether or not an organization of employees constitutes a trade union within the meaning of the *Labour Relations Act*, the Board must not impose any requirements, structural or otherwise, which do not have their basis in the Act (*Re CSAO National (Inc.) and Oakville Trafalgar Memorial Hospital Association* [1972] 2 O.R. 498 Ont. C.A.). Consequently, except as required by the Act, the Board does not inquire into the structure or internal operation of a trade union.

4. Except as recognized by, and for the purposes of labour relations legislation, like the *Labour Relations Act*, a trade union is not an entity known to law. Apart from its special status under the Act or other legislation, a trade union is essentially a club or voluntary association (for our purposes those terms are interchangeable) which has no existence in law separate and apart from its members. Even under the Act, a trade union is no more than a group of employees who have agreed, each with every other, to join or associate together for purposes which include the promotion of certain common objectives in their employment relations with their employer for their collective benefit. The terms and conditions of the agreement that binds these employees together, and which creates the organization, constitute a contract. Because a trade union has no existence in law separate and apart from that of its members and because a trade union has no right to contract except as provided by legislation, this contract of association is not one between members and the trade union. Instead, it is a complex of contracts between each member and every other member of the organization. This contract, which section 84 of the Act contemplates will be in writing, is commonly called a “constitution” (see *Astgen et al. v. Smith et al.* [1970] 1 O.R. 129 (Ont. C.A.)). Although the requirement that a trade union be an “organization” implies that it must have some structure, and the nature of the rights, obligations and duties that the Act provides trade unions with implies that there are certain characteristics that it must have, neither the Act, nor anything else, specifies how an organization must be structured or operated in order to be a trade union within the meaning of the Act.

5. Once found to be a trade union within the meaning of the *Labour Relations Act*, section 105 of the Act establishes a rebuttable presumption that that organization of employees is a trade union for the purposes of any subsequent proceedings before the Board. However, an organization

of employees can cease to be a trade union and, if it does, its bargaining rights and any collective agreement to which it is a party will also cease to exist as such (see *L.M.L. Foods Inc.*, [1985] OLRB Rep. Aug. 1252). Accordingly, it is of fundamental importance that the contractual relationship between members as set out in a trade union's constitution, once created, be maintained. Substantial and persistent failure to abide by its constitution may be evidence that an organization has dissipated or abandoned its constitution, or that its members have ceased to be governed by the constitution that previously made it a "trade union" in such a way that it no longer is one (see *Center Tool & Mold Company Limited* [1985] OLRB Rep. May 633; *Footwear Fashions Limited*, [1981] OLRB Rep. April 454).

6. There are four ways in which a club or voluntary association, like a trade union, can be dissolved:

- (a) if an event occurs which the constitution prescribes will result in dissolution;
- (b) if all of its members agree that it be dissolved;
- (c) if a court or tribunal having jurisdiction to do so orders that it be dissolved; or
- (d) if the foundation upon which the organization was founded is lost

(see *Re William Denby & Sons Ltd. Sick and Benevolent Fund; Rowling et al. v. Wilkes et al.*, [1971] 2 All E.R. 1196 (Ch.D.)). In this proceeding, we are concerned with the last of those four.

7. Not every failure to comply with the constitution will result in the dissolution of the organization and the concomitant loss of trade union identity or "status". It would be impractical and unrealistic to expect any organization, particularly one not run by lawyers, to adhere to the letter of its constitution. Moreover, many trade unions would find themselves on a merry-go-round of losing and regaining "status" as such, a situation which would cause chaos in the labour relations of this province. Furthermore, to require a trade union to abide by the letter of its constitution would require the Board to engage in investigations relating to the internal structure and operation of trade unions on an unprecedented and unjustified level of detail. Such matters of internal structure and operation of a trade union are best and properly left to its members except where the Board must become involved in order to administer or apply the *Labour Relations Act* (as, for example in complaints alleging breaches of sections 48, 68 or 69). As the court pointed out in *Re William Denby Sick Fund, supra*, the foundation or substratum of an association (like a trade union) does not disappear because its officers misinterpret the constitution or because the officers, or persons purporting to act as its officers, act in a manner which appears to be inconsistent with the provisions of the constitution. Nor will mere inactivity lead to that conclusion, particularly where a less drastic one is available. Fundamentally, a trade union is its members and the complex of contracts between each of them. So long as an organization, having become a trade union, de facto continues to operate and to represent its members, regardless of the apparent quality of that representation, in their relations with their employer, it continues to be a trade union. Any issue relating to the internal structure or operation of a trade union is one between its members, to be raised by any of those members who wish to do so, either within the organization itself or in the appropriate judicial forum, which forum is not the Ontario Labour Relations Board.

8. Counsel for the applicant argued that the Canadian Construction Union has virtually ignored its constitution in every significant respect and that it has, as a consequence, not "existed" as a trade union or at all as a viable organization for several years. He asserts that there was no

constitutional authority for any of those things that a president and general business manager have done for some nine years and that all those things, including the purported collective agreement upon which the respondent and the Canadian Construction Union rely in this proceeding are, in effect, nullities. Counsel for the Canadian Construction Union, supported by counsel for the respondent, agrees that the organization has not abided by the letter of its constitution but submits that the breaches are more technical rather than fundamental in nature and that the Canadian Construction Union continues to be a functional, viable trade union.

9. On the evidence, there is no doubt that the letter of constitution of the Canadian Construction Union has not been followed. Indeed the breaches of the constitution have been significant. For example, Article 6 of the constitution provides that there be four executive officers; President, Vice-President, Sargeant at Arms, and General Business Agent. Article 8 provides that these four executive officers constitute the organization's executive committee, which committee is to direct its affairs. Article 8 also stipulates that vacancies on the executive committee be filled in accordance with section 4 of Article 5. Section 3 of Article 5 provides that vacancies in executive offices be filled by appointment by the executive committee until the next regular meeting. The evidence reveals that between some time in 1978 and the end of April, 1987, only two of the executive offices have been filled, even ostensibly. During that period, Marcel Savoie has acted as President and Clive Thomas has acted as General Business Agent. There was no evidence that there was any attempt made to fill either of the other two offices until after these proceedings began.

10. Section 3 of Article 10 of the constitution stipulates that regular general meetings be held in February and August of each year. Between 1978 and May 1987, general meetings of the Canadian Construction Union were held only on February 8, 1978, April 2, 1980, November 3, 1982, February 10, 1983 and February 15, 1984. Consequently, during a period in which they were 19 meetings contemplated by the organization's constitution, there were only five held. None of those were held within the last three years.

11. Pursuant to Article 5 of the constitution, a general election of officers must be held at the first regular meeting (that is, in February) of each year. There were no elections, as such, at any of the meetings held between 1978 and May 1987. In fact, there was no evidence of when the last such election was held. Mr. Thomas was specifically asked when the last election was held. He could not recall. Indeed, it appears that Mr. Savoie, the current President, has *never* been elected to that office.

12. Section 1 of Article 9 contemplates that stewards be elected. On the evidence before the Board, Guy Sabourin has been acting as the steward for the employees of the respondent represented by the Canadian Construction Union pursuant to an appointment in July 1986, by Messrs. Savoie and Thomas acting as the executive committee. Although Article 9 contemplates temporary appointments "when necessary", there is no explanation why no election was held either at the time or in the ten and a half months (at the time of the hearing) since.

13. Article 12 provides that each collective agreement to which the Canadian Construction Union is a party must be signed on its behalf by the President, General Business Agent, and at least one representative of the bargaining unit concerned. No employee of the respondent represented by the Canadian Construction Union has ever signed any other collective agreements that apply to that bargaining unit.

14. Finally, we note that the evidence suggests that the employees of the respondent in the bargaining unit represented by the Canadian Construction Union have never been provided with a copy of either the constitution or the collective agreement that governs the terms and conditions of their employment. Indeed the evidence suggests that the Canadian Construction Union has made

little effort to communicate with those members regarding their employment relations with the respondent and was less than diligent in policing the collective agreement.

15. On the other hand, there is no evidence before the Board to indicate that any member of the Canadian Construction Union has made any complaint or taken any action with respect to any of the aforesaid. For example, there is no indication that any member has complained that there have not been sufficient general meetings. There has been no complaint by any member about the manner in which Mr. Savoie and Mr. Thomas either took or remained in office as President and General Business Agent respectively. To the contrary, the minutes of the general meetings held on February 8, 1978, April 2, 1980, November 3, 1982, February 12, 1983, and February 15, 1984 reveal that the persons present at each continued each of the executive officers then in office by motion made and carried. The evidence does not reveal that any member has complained about the appointment or selection of stewards, about the manner in which collective agreements have been negotiated or executed, or about anything having to do with a representation by the Canadian Construction Union. We cannot accept the suggestion of counsel for the applicant that no one knew enough to complain. On the evidence, the employees of the respondent know that it is a condition of their employment with the respondent that they become, as they all did, members of the Canadian Construction Union. They also know that the terms and conditions of their employment are dictated by a collective agreement. This is, in our view, a sufficient basis for making inquiries or complaints but there is no evidence before the Board that any one other than Mr. Stephen Broomer, about whom more will be said later, ever made any inquiry at all.

16. Messrs. Savoie and Thomas, as its executive officers and executive committee, have directed its affairs. Executive committee meetings have been held monthly, dues have been remitted by the respondent and received and deposited in the bank account by the Canadian Construction Union. It has issued membership cards and income tax receipts for dues and received. Financial records and statements have been kept and prepared for each year. Finally, it has, as discussed below, maintained a collective bargaining relationship with the respondent in furtherance of its purpose of representing those of its members who are employed by the respondent. Consequently, although the Canadian Construction Union's adherence to its constitution has been less than exemplary, it cannot be said that it has entirely abandoned its constitution or that it has ceased to operate as a trade union. In our view, the spirit and essence of the contractual relationship between members of the Canadian Construction Union has been maintained and it has de facto operated as a trade union within the meaning of section 1(1)(p) of the Act. In the result, we find that the Canadian Construction Union remains a trade union within the meaning of the *Labour Relations Act*.

B. ABANDONMENT OF BARGAINING RIGHTS

17. In a forceful argument, counsel for the applicant attacks the right of the Canadian Construction Union to bargain on behalf of the employees affected by this application on the basis that it has abandoned any bargaining rights it once had with respect to L'Abbe Construction (Ontario) Ltd. and that the agreement between them is therefore not a "collective agreement" that can constitute a bar to this application. Counsel argues that the Canadian Construction Union's level of activity, both in bargaining for and enforcing collective agreements with the respondent, is below that which must be required of a trade union if section 3 of the Act is to have any real meaning. Counsel for the Canadian Construction Union and counsel for the respondents submit that there has been an active ongoing collective bargaining relationships between their clients and the manner in which the parties choose to bargain is their business.

18. The Act, in section 1(1)(e), provides that:

"collective agreement" means an agreement in writing between an employer or an employers'

organization, on the one hand, and a trade union that, or a council of trade unions that, represents employees of the employer or employees of members of the employers' organization, on the other hand containing provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, the employers' organization, the trade union or the employees, and includes a provincial agreement.

19. A trade union may abandon bargaining rights after it has obtained them. Whether or not a trade union has abandoned bargaining rights is a question of fact to be determined on the basis of the evidence in each case (See *John Entwistle Construction Ltd.*, [1979] OLRB Rep. Nov. 1096 being a reconsideration of the Board's decision at [1979] OLRB March 211; application for judicial review dismissed in *Re Carpenters District Council of Lake Ontario and Hugh Murray (1974) Ltd. et. al; Re Labourers International Union of North America and John Entwistle Construction Ltd. et. al* (1982) 125 D.L.R. (3d) 568 (Ont. Div. Ct.); leave to appeal to Ontario Court of Appeal dismissed February 2, 1981). The notion of abandonment of bargaining rights by a trade union is well-established in the Board's jurisprudence and is based in the expectation that a trade union, having acquired bargaining rights, will actively exercise them. Conversely, failing to use such rights may result in a finding that they have been abandoned and therefore lost. In *J. S. Mechanical*, [1979] OLRB Rep. Feb. 110, at paras 4 and 5, the Board outlined the principle of abandonment and set out some of the factors that it will consider in determining whether or not a trade union has abandoned its bargaining rights:

4. Over the last 20 years the principle of abandonment has been deeply entrenched in the Board's jurisprudence. Once a union has obtained bargaining rights either through certification or voluntary recognition it is expected that it will actively promote those rights. If a union declines to pursue bargaining rights it may lose them through disuse. Whether a union has abandoned its bargaining rights is a matter which must be assessed on the facts of each individual case, but once the Board is satisfied that a union has failed to preserve its rights, the union may no longer rely on them to support the appointment of a Conciliation Officer under section 15 of the Act (see *Cooksville Sheet Metal*, [1974] OLRB Rep. June 365; *John Entwistle Construction Limited*, [1972] OLRB Rep. Oct. 919; *Elgin Construction Co. Limited*, [1969] OLRB Rep. April 134; *Guelph Cartage Company*, 55 CLLC para. 18,018). As well, if a union has abandoned its bargaining rights it may be precluded from relying on them either to bar another agreement that renews itself automatically (see *Catalytic Enterprises Limited*, [1974] OLRB Rep. April 264; *O & W-Electronics Limited*, [1970] OLRB Rep. Jan. 1213; *Architectural Acoustics & Drywall*, [1970] OLRB Rep. Feb. 1408; *N.W. Clayton Sheetmetal and Heating Co. Ltd.*, [1967] OLRB Rep. April 69), or to require an employer to bargain by giving notice to bargain under such an agreement (see *Rainee Manufacturing Products Limited*, [1967] OLRB Rep. Nov. 796). A union's abandonment might also obviate the necessity for the Board to determine the merits of a termination application (see *Graphic Centre (Ontario) Inc.*, [1977] OLRB Rep. June 379; *Northern Engineers & Supply Co. Limited*, [1968] OLRB Rep. Oct. 731; *Barrie Tanning Limited*, [1966] OLRB Rep. May 128).

5. In assessing the bargaining relationship between the union and the employer to determine whether or not a union has abandoned its bargaining rights, the Board considers various factors. Among other possible indicators, the Board looks to the length of the union's inactivity, whether it has made attempts to negotiate or renew a collective agreement, whether the union has sought to administer the collective agreement through the grievance and arbitration provisions in the collective agreement, whether terms and conditions of employment have been changed by the employer without objection from the union as well as whether there are any extenuating circumstances to explain an apparent failure to assert bargaining rights.

20. A trade union which has in fact abandoned its bargaining rights will necessarily have not represented the employees concerned well. However, the quality of the representation provided by a trade union, though it reflects poorly upon that organization, is not, by itself, something that is of any great assistance in determining whether or not bargaining rights have been abandoned. Quality of representation may well be an issue in complaints made to the Board under section 68 of the Act; it is not an issue when the question before the Board is whether or not a trade union has aban-

doned those rights. Although the extent to which there has been collective bargaining is clearly a factor to be considered, the Board will not inquire into or pass judgement on the trade union's collective bargaining philosophy or the manner in which it and the employer have bargained for their collective agreement(s) for the purposes of determining whether or not the trade union has abandoned its bargaining rights (*CDC Holdings Limited*, [1979] OLRB Rep. Dec. 1142; *The Borden Company Limited, Ingersoll, Ontario*, [1976] OLRB Rep. July 379; *Dutch Laundry and Dry Cleaners Ltd.*, [1968] OLRB Rep. April 45). That, in our view, is a matter for the parties themselves. If the members of a trade union do not like the manner in which the union is bargaining on their behalf, it is open to them to take whatever action they feel is necessary, either within the organization or under the *Labour Relations Act*.

21. The degree of activity that is expected of a trade union in order that it not be found to have abandoned its bargaining rights must necessarily depend on the facts of this case. However, a review of the cases reveals that it must be established that there has been virtually no collective bargaining activity at all by a trade union over a period of time before the Board will find that it has abandoned its bargaining rights (see *Dutch Laundry Dry Cleaners Ltd.*, *supra*; *O & W Electronics Limited*, [1970] OLRB Rep. Jan. 1213; *Cooksville Steel Limited*, [1974] OLRB Rep. June 365; *The Borden Company Limited, Ingersoll, Ontario*, *supra*; *Dravo of Canada Limited*, [1977] OLRB Rep. Sept. 568; *J. S. Mechanical*, *supra*; *CDC Holdings Limited*, *supra*; *John Entwistle Construction Limited*, *supra*; *The Municipality of Metropolitan Toronto*, [1986] OLRB Rep. Oct. 1448).

22. The respondent, L'Abbe Construction (Ontario) Ltd. was incorporated in 1973. It was operated as a business in the construction industry until 1977 when it temporarily discontinued its operations. In 1981, the company became active again and, with the exception of 1985, has operated a business in the construction industry in Ontario, primarily in Ottawa, continuously since that time. As noted above, the Canadian Construction Union was certified by the Board as the exclusive bargaining agent for all carpenters and carpenters' apprentices and construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman by certificate dated February 8, 1974. This bargaining unit description was subsequently incorporated verbatim, as the scope clause, into a collective agreement between the Canadian Construction Union and the respondent. Although Francois L'Abbe, a principal of the respondent, testified that there were prior collective agreements between the Canadian Construction Union and L'Abbe Construction (Ontario) Ltd., there were no collective agreements for any period prior to May 1, 1980 produced at the hearing. Nor was there any evidence of how many collective agreements there were, or what periods of time they covered between 1974 and May 1, 1980. Although no copy of it was produced, it is evident an agreement was in effect between May 1, 1980 and April 30, 1982. The first document relating to the collective bargaining relationship between the Canadian Construction Union and the respondent which was produced at the hearing is an amendment to the 1980-82 agreement dated June 1, 1981 which provides:

AMENDMENT

to the Collective Agreement

BETWEEN: L'ABBE CONSTRUCTION
(ONTARIO) LTD.
hereinafter called
"the Company",

- and -

CANADIAN CONSTRUCTION, BUILDING
MAINTENANCE AND GENERAL
WORKERS' UNION
(N.C.C.L.), hereafter
called "the Union".

which took effect on May 1, 1980 for a term of two years to April 30, 1982.

- - - -

It is hereby agreed that the collective agreement shall be amended as follows:

Section 3.01 shall be amended to read: The regular work week for carpenters and other construction trades shall be forty (40) hours and for employees paid the labourer's rate shall be forty-two and a half (42 1/2) hours.

Section 5.01 shall be amended to read: Carpenters shall be paid at the rate of double the regular hourly rate for work performed in excess of forty (40) hours per week. The employees paid the labourer's rate shall be paid at the rate of time and one-half the regular hourly rate for work performed in excess of forty-two and a half (42 1/2) hours in a week.

IN WITNESS WHEREOF the parties hereto have signed at Ottawa, Ontario, on the First day of June 1981.

For the Company:
"illegible signature"

For the Union:
"Marcel Savoie"
"Clive Thomas"

23. On September 7, 1982, the respondent and the Canadian Construction Union renewed and amended the 1980-82 agreement as follows:

RENEWAL AND AGREEMENT

of the Collective Agreement

BETWEEN: L'ABBE CONSTRUCTION (ONTARIO) LTD.
hereinafter called "the Company",

- and -

CANADIAN CONSTRUCTION, BUILDING MAINTENANCE AND
GENERAL WORKERS' UNION (N.C.C.L.),
hereinafter called "the Union".

which took effect on May 1, 1980 for a term of two years to April 30, 1982.

It is hereby agreed that the collective agreement shall be renewed for a further period of two (2) years from the termination date, and that the rates shown in Schedule I of the agreement shall be amended as amended hereto.

IN WITNESS WHEREOF the parties hereto have signed at Ottawa, Ontario on the 7th day of September 1982.

For the Company:
"illegible signature"

For the Union:
"Marcel Savoie"
President

"Clive Thomas"
General Business
Agent

(NOTE: The schedule of job classifications and wage rates are not reproduced.)

24. Subsequently, a full-length document containing 29 articles and the same schedule of job classifications and wage rates that was attached to the September 7, 1982 "Renewal and Amendment" was prepared. It covers the sorts of things which are found in most collective agreements. According to Francois L'Abbe, whose testimony was confirmed by the September 7, 1982 document, this was in effect the "standing agreement" between the company and the Canadian Construction Union. Subsequently, pursuant to Article 29 of that agreement, it was automatically renewed for two further 1 year terms. Finally, by memorandum dated July 31, 1986, the respondent and the Canadian Construction Union agreed that:

AMENDMENT to collective agreement between L'Abbe Construction (Ontario) Ltd. and Canadian Construction, Building Maintenance and General Workers' Union, which took effect for a two year term from May 1, 1982 to April 30, 1984 and was renewed for one-year terms to April 30, 1986.

The parties hereby mutually agree that the above agreement shall run for a further period from May 1, 1986 to April 30, 1988.

For the Company
"illegible signature"

For the Union
"Marcel Savoie"
President

"Clive Thomas"
General Business
Agent

Dated this 31st of July, 1986

25. Article 8.01 of the agreement provides that:

8.01 - Employees covered by this agreement shall be classified according to Schedule I appended hereto, and paid not less than the rates indicated. These rates shall conform immediately with any increases in the prevailing union rates for these classifications in the Ottawa area. If an employee's classification is changed, he shall be notified immediately.

This article reflects the arrangement that has always been in place between the respondent and the Canadian Construction Union with respect to wages. It was pursuant to this provision that wage rates were adjusted in July and December, 1986.

26. The bargaining between the respondent and the Canadian Construction Union has not been either extensive or formal. It has consisted largely of telephone conversations between Francois L'Abbe and Mr. Thomas and the occasional, relatively brief, meeting between them. To a great extent, the frequency of these discussions depended upon the level of activity of the respondent. The more active the company was, the more discussions there were. The bargaining process that has been adopted by the respondent and the Canadian Construction Union is "automatic" to a

significant degree. For example, with the exception of 1981 agreement to amend Articles 3 and 5 of the agreement in mid-term, the bargaining has consisted of a brief review of the agreement and Mr. Thomas advising Mr. L'Abbe of the applicable "prevailing union (provincial) rates" of pay in the Ottawa area which, upon being confirmed, were implemented by the respondent. This pattern was well established and has even been incorporated into Article 8 and 29 of the agreement between them. However, the evidence also reveals that both the respondent and the Canadian Construction Union did regularly review the agreement to determine whether or not it remained satisfactory to them.

27. The Canadian Construction Union has not been particularly aggressive in its relationship with the respondent. Its collective bargaining philosophy, which is personified in Mr. Thomas, is non-confrontational and seeks only to obtain wage (but not benefit) parity with persons employed in the Ottawa area under provincial collective agreements negotiated by or on behalf of other trade unions, including the applicant.

28. The applicant attacks this approach on the basis it is not bargaining at all and as being a rationalization for what it submits has been a total lack of collective bargaining activity by the Canadian Construction Union. Although, the collective bargaining philosophy of the Canadian Construction Union is not one which is adopted by the applicant or other "mainstream" unions like it, there is, in our view, nothing fundamentally wrong with it or its result; that is, a collective agreement with which both the respondent and the Canadian Construction Union, and apparently those employees of the respondent who are affected, feel comfortable. Nor does the fact that this comfortable arrangement has led the Canadian Construction Union to be rather lax in its enforcement of the agreement (to the extent that Mr. Thomas, its General Business Agent has never visited the respondent's Place de Ville job site since work there began in June 1986, and was unaware that the overtime and wage rate provisions of the agreement were being breached until the breaches were brought to his attention by the Employment Standards Branch of the Ministry of Labour and the company itself respectively) does not, in the context of the situation as a whole, establish that the Canadian Construction Union has abandoned its bargaining rights. The process by which the respondent and the Canadian Construction Union arrive at the agreements between them, although different from the approach to collective bargaining adopted by the applicant, is nevertheless collective bargaining. The respondent and the Canadian Construction Union do review, discuss, and consider the agreement between them and they do abide by and follow it. The provisions in the agreement do set out what are in fact the terms and conditions of employment for those carpenters, carpenters' apprentices and construction labourers who are not non-working foremen or persons above that rank employed by the company in Board Area 15, including the condition that all such persons become and remain members of the Canadian Construction Union while they are employed in the bargaining unit.

29. Nor do we agree with counsel for the applicant that more than the Canadian Construction Union has done to cultivate its bargaining rights with the respondent must be required of a trade union in order to give meaning to section 3 of the Act. Section 3 provides that, "every person is free to join a trade union of his own choice and to participate in its lawful activities". That a person may be free to *join* any trade union that will have him/her does not mean that that person is necessarily free to choose any trade union s/he wishes to *represent* him/her in his/her employment relations with his/her employer. Once a trade union gains the right, pursuant to the Act, to bargain exclusively on behalf of a group of employees, no employee in that group (i.e. the bargaining unit) is entitled to select any other trade union to do so except as provided by section 5 of the Act. Indeed, subject to section 46(4), section 46(1) permits an employer and a trade union to include in a collective agreement a requirement of membership in the trade union be a condition of employment with the employer. The Act also provides, in sections 57, 59 and 60, means by which employ-

ees represented by a trade union can, if they wish to do so, terminate the right of that trade union to represent them. However, they must do so in accordance with the provisions of the Act.

30. We have already found that the Canadian Construction Union continues to be a trade union within the meaning of the *Labour Relations Act*. In our view, the evidence also reveals that the Canadian Construction Union has maintained a sufficiently active collective bargaining relationship with the respondent to make it inappropriate for us to find that it has abandoned its bargaining rights with respect thereto.

C. EMPLOYER PARTICIPATION IN THE ADMINISTRATION OF THE CANADIAN CONSTRUCTION UNION

31. Clause (a) of section 48 of the Act provides that:

48. An agreement between an employer or an employers' organization and a trade union shall be deemed not to be a collective agreement for the purpose of this Act,

- (a) if an employer or an employers' organization participated in the formation or administration of the trade union or if an employer or an employers' organization contributed financial or other support to the trade union;

The applicant asserts that Stephen Broomer was a "foreman" who, during the material times, exercised managerial functions, within the meaning of section 1(3)(b) of the Act, on behalf of the respondent. The applicant further asserts that Mr. Broomer was, during the material times, involved in the administration of the Canadian Construction Union as a steward. Accordingly, submits the applicant, the respondent employer has, through Mr. Broomer, been involved in the administration of the Canadian Construction Union and, pursuant to clause (a) of section 48, the agreement between the respondent and the Canadian Construction Union is not a collective agreement for purposes of the Act and is therefore not a bar to this application. Counsel for the applicant did not suggest that the mere fact that Mr. Broomer was both a member of the Canadian Construction Union and exercising managerial functions would lead to the same result.

32. Section 1(3)(b) of the *Labour Relations Act* provides that no person who, in the opinion of the Board, exercises managerial functions shall be deemed to be an employee. Section 1(1)(p) of the Act provides that a trade union:

"trade union" means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency.

The phrase "organization of employees" in section 1(1)(p) does not mean that an organization must be one "of employees only" in order to be a trade union. Nor does the fact that some members of a trade union exercise managerial functions, either in relation to other members of the same trade union or otherwise, by itself, constitute actual employer support of or participation in that trade union. Further, although the fact that some members of a trade union both exercise managerial functions and are involved in the administration of the trade union, either as a steward or otherwise, may raise a concern that there has been employer support of or participation in it, that fact alone is not determinative of the issue. This is particularly true for craft and construction trade unions (including "mainstream" ones like the applicant) in which it has long been common for persons who are non-working foremen, superintendents or even employers in their own right to be members. It would be no small surprise to these trade unions that the mere fact they have (or had) such persons as members, whether or not they were also involved in the administration of the organization, could lead either to them being found to be trade unions no longer, or cause the

Board to conclude that agreements they had entered into with employers are not collective agreements for purposes of the *Labour Relations Act*. The question that must be answered under clause (a) of section 48 is not whether a person who is not an “employee” has participated in the formation or administration of the trade union, but rather whether an employer has been so involved, either through a member or otherwise.

33. Whether or not Mr. Broomer was exercising managerial functions and, if so, what effect, if any that has on the agreement between the respondent and the Canadian Construction Union are questions that need be answered only if Mr. Broomer was in fact involved in the administration of the Canadian Construction Union. In that regard, we prefer and accept the evidence of Mr. Thomas where it conflicts with that of Mr. Broomer. We find that, on the evidence before the Board, Mr. Broomer played no part in the administration of the Canadian Construction Union, either as a steward or otherwise. Accordingly, we reject the applicant’s submission that the agreement between the respondent and the intervener should be deemed not to be a collective agreement pursuant to clause (a) of section 48 of the Act. That objection to the Canadian Construction Union’s status to intervene in these proceedings is therefore dismissed.

34. In the result, all 3 of the applicant’s objections to the participation of the Canadian Construction Union are dismissed.

35. There is no indication in the material before the Board that the respondent employed any persons for whom the applicant seeks bargaining rights in this application who are not covered by the terms of the collective agreement between the Canadian Construction Union and the respondent during the material times. Further, this application was not made during the “open period” of that agreement and, there being no unrepresented employees in the bargaining unit applied for, the collective agreement between the respondent and the intervener constitutes a total bar to this application. Accordingly, the application is dismissed.

CONCURRING OPINION OF BOARD MEMBER J. REDSHAW;

1. While I concur with my colleagues on the decision as a whole, I had a great deal of difficulty in agreeing to that portion of the decision relating to the status of the intervener.

2. This is an organization that purports to be a trade union and yet admits:

(a) That it has not abided by a significantly large portion of its constitution for some nine years or more;

(b) That it has not held elections for any of the positions of Officer or Executive Committee for years and only within the last month prior to the hearing had a replacement been appointed, (not elected), for Sergeant at Arms;

(c) The affairs of the intervener have been handled by the Executive Committee, comprised of the President, Vice-President, Sergeant at Arms and General Business Manager. Of the current committee only the General Business Manager was ever elected in accordance with the constitution at sometime in the past, (he cannot remember when). The Vice-President and Sergeant at Arms were never elected, and as of the hearing date the position of the Vice-President was vacant;

(d) The General Business Manager has not had any contact with anyone in the bargaining unit at anytime, except a phone call from Stephen Broomer,

and a letter sent to Gary Sabourin, the Carpenter Foreman, appointing Sabourin as shop steward for the employees including the Labourers. Thomas never contacted Sabourin prior to or after the appointment, (Shop Stewards according to the constitution are to be elected on temporary appointments. Sabourin has been Shop Steward for ten months);

(e) Has never held meetings for the purpose of taking proposals to the collective agreement;

(f) Has never held meetings for the purpose of ratifying the collective agreement;

(g) Has not circulated copies of the collective agreement or the constitution to the members;

(h) Has not held any general meetings for at least three and a half years;

(i) Has never handled a grievance on behalf of the members. (The Employment Standards Branch had to collect overtime pay for the employees when both the employees and the Employment Standards Branch were unable to find the Intervener).

3. The General Business Manager did testify that the intervener collected dues, issued statements for Income Tax purposes and issued membership cards. He mailed the membership cards to the employer.

4. I believe in the principles as stated in paragraph 3 of this decision:

“...In determining whether or not an organization of employees constitutes a trade union within the meaning of the *Labour Relations Act*, the Board must not impose any requirements, structural or otherwise, which do not have their basis in the Act (*Re CSAO National (Inc.) and Oakville Trafalgar Memorial Hospital Association* [1972] 2 O.R. 498 Ont. C.A.). Consequently, except as required by the Act, the Board does not inquire into the structure or internal operation of a trade union.”

5. If there is ever a case to be made for a change to this policy, the out of date, mismanaged and autocratic organization of the Canadian Construction, Building Maintenance and General Workers' Union (N.C.C.L.) would be in the forefront as an example in favour of change.

1135-87-R Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. A. J. MacKinnon & Associates, **Angus J. MacKinnon Consultants Limited**, Respondents

Certification - Construction Industry - Employer - Respondent providing construction project management services to owner of project - Order for casual labourers made by owner but persons put to work and paid by construction project manager - Construction project manager the employer for purposes of the Act - Certificates issuing

BEFORE: *Harry Freedman*, Vice-Chair, and Board Members *W. H. Wightman* and *H. Peacock*.

APPEARANCES: *A. M. Minsky*, Q.C. and *M. Mihajlovic* for the applicant; *Angus J. MacKinnon* and *Kathryn Stiver* for the respondents.

DECISION OF THE BOARD; October 7, 1987

1. The Board delivered the following oral decision at its hearing in this matter on October 5, 1987:

This is an application for certification in which the respondent A. J. MacKinnon & Associates takes the position that it is not the employer of the employees affected by this application.

At the first day of hearing on September 28, 1987, the Board, upon the consent of the respondent A. J. MacKinnon & Associates and Angus J. MacKinnon Consultants Limited added Angus J. MacKinnon Consultants Limited as a respondent to this proceeding and declared that the two respondents are one employer for purposes of the *Labour Relations Act*, pursuant to section 1(4) of the Act.

Angus J. MacKinnon Consultants Limited, hereafter referred to as Consultants, is a construction manager which manages all aspects of a construction project on behalf of a client. It entered into a construction management agreement with Westowne Motors (1983) Limited to provide project management services for the construction of a showroom and service facility at premises owned by Westowne Motors in Toronto.

Consultants retained a construction superintendent for that project. Consultants' intention was to use the employees of sub-contractors on the project to perform whatever general labour that was required. Consultants, pursuant to that intention, used the employees of Fama Concrete Forming initially. The owners of Westowne Motors put a stop to this use because of the cost involved. They chose instead to have that general labour work performed by casual labourers referred to the project from the local Canada Employment Centre, an office of Employment and Immigration Canada.

While the evidence suggests that the order for labour was placed by Westowne Motors, the employees referred to the construction project were put to work by Consultants.

At the time of the application, the project superintendent retained by Con-

sultants was Michael Eisele. He testified that he both hired and dismissed employees working as casual labourers on the construction project. He directed the labourers' day to day work, assigned their duties and recorded the work they performed on the respondents' daily activity sheets.

The employees were paid cash and occasionally by cheque. The cheques were issued by A. J. MacKinnon & Associates. The receipts for the cash were stamped with the name A. J. MacKinnon & Associates.

It seems to us from all of the evidence that there is no doubt that for purposes of the *Labour Relations Act*, Consultants was employer of the employees affected by this application.

While Consultants is a construction manager, and did not intend to create an employment relationship, it is clear from the evidence that Consultants, through its construction superintendent exercised the kind of fundamental control over the working lives of the employees that makes it the employer for purposes of the Act. See *Sutton Place Hotel*, [1980] OLRB Rep. Oct. 1538 at 1552-53; *Sylvania Lighting Services*, [1985] OLRB Rep. July 1173 at 1175.

The determination of who is the employer is very much a question of fact. Merely because Consultants is a construction manager does not thereby prevent a finding that it is the employer of employees who are at work on a construction project. See for example *Group Thirty-Three Limited*, [1974] OLRB Rep. Dec. 888.

Therefore, we are satisfied that Consultants was the employer of the labourers affected by this application on July 24, 1987, the date the application for certification was made.

2. Subsequent to the Board's decision on the determination of who the employer was, the Board dealt with the balance of the application.

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[Remainder of decision omitted: Editor]

0266-87-M Beacon Transit Lines Incorporated, Employer v. Teamsters Union, Local 938, Trade Union

Collective Agreement - Reference - Collective agreement between federally certified union and employer purporting to bind successors - Employer becoming bankrupt and provincially regulated employer receiving federally regulated employer's operating authority - Whether union successor rights created by agreement - Parties cannot by the collective agreement bind a third party to their contract - No applicable successor rights legislation - Arbitrator should not be appointed by Minister because no collective agreement in force

BEFORE: *Rosalie S. Abella*, Chair, and Board Members *W. H. Wightman* and *E. G. Theobald*.

APPEARANCES: *George W. Adams, Sharon Groom, Al Hume Jr.* for the employer; *Harold F. Caley* and *Fred Johnston* for the trade union.

DECISION OF THE BOARD; October 14, 1987

1. This is a request from the Minister pursuant to section 107 of the *Labour Relations Act* asking the Board to determine "... whether or not a collective agreement exists between the parties, and if so, whether the Minister of Labour has authority to make the requested appointment". The trade union had requested the appointment of an arbitrator pursuant to section 44(4) of the Act.

2. The parties have agreed that the following facts are not in dispute:

- i) Humes Transport Limited was founded in 1922. It operated as a licensed carrier of temperature controlled foods.
- ii) Humes carried on business in the United States and throughout Canada. It was regulated in matters of labour relations pursuant to the Canada Labour Code.
- iii) Humes was unionized in 1950 by the Teamsters.
- iv) Humes continued to carry on business in the United States and inter-provincially until September, 1986 when it became bankrupt.
- v) Beacon Transit Lines Incorporated was established in 1981. Pursuant to its licensing authority, it transported fresh and frozen food using refrigerated trailers. Beacon received its operating authority from Humes in 1981 for value.
- vi) Beacon's operations as a broker operation have been confined to Ontario. It is regulated by provincial labour law.
- vii) A collective agreement exists between Humes and the Teamsters.

3. Article 39 of the Collective Agreement between Humes and the Teamsters states:

“The terms of this Agreement shall be from April 1, 1986 to March 31, 1987. *This Agreement shall be binding upon the parties hereto, their successors, administrators, executors and assigns.*”

[emphasis added]

Although both parties agree that neither the Canada Labour Relations Board nor this Board has the jurisdiction to make a declaration of successor rights, the union argued that Article 39 of the Collective Agreement bound Beacon as a “successor” and that a form of voluntary recognition existed between Beacon and the Teamsters. Its position was that the Board ought to “pierce the corporate veil” and find that Beacon and Humes are the same company. Privity of contract, the union argued, was preserved through Article 39, and through this article the parties have, by agreement, created successor rights.

4. In the alternative, it was the position of the union that what was at issue was the interpretation of a provision of the collective agreement (Article 39), a matter better decided by an arbitrator. The Board ought therefore, the union argued, advise the Minister that an arbitrator should be appointed, and that the arbitrator’s first inquiry ought to be the question of whether a collective agreement exists between Beacon and the Teamsters.

5. Beacon’s position was that there is no collective agreement between it and the Teamsters, that Article 39 cannot cure the constitutional obstacles or create privity of contract between these two entities, and that this Board, having been asked by the Minister specifically whether a collective agreement exists between Beacon and the Teamsters, should address that issue. Beacon argued that any lacuna created by the absence of a statutory remedy for successor claims on transfers between federally regulated and provincially regulated companies can only be remedied through legislation.

6. For purposes of these proceedings only, Beacon acknowledged that Humes transferred a license to Beacon in 1981, that in 1981 four out of seven shareholders overlapped, and that in 1984, two out of five shareholders overlapped. Trailers and trucks have been interchanged over the years between Humes and Beacon. Beacon argues, however, that the only agreement in existence is between Humes and the Teamsters, and that since Humes is federally regulated, the Minister has no constitutional authority to appoint an arbitrator under the Ontario *Labour Relations Act*. Article 39, argues Beacon, is not a sufficient bridge to make Beacon a party under the Agreement and bring it within the Minister’s jurisdiction.

7. This matter originated as a grievance filed by the Teamsters with Beacon. The essence of the grievance was that Beacon was violating “the current Collective Agreement in total, in not applying it to the employees. By virtue of Section 39.1 of our Collective Agreement with Humes Transport Ltd., you are bound to this Agreement.” Counsel for Beacon replied to the grievance by denying that Beacon was a party to the agreement and therefore sent a copy of the grievance letter to the Trustee in Bankruptcy for Humes.

8. Although we agree with counsel for the union that matters of interpretation arising out of a collective agreement are usually determined by an arbitrator, there is also no doubt that the Board has authority to do so in circumstances such as these. (*Re Carpenters’ District Council of Toronto and Vicinity and Engineering Structures and Components*, (1978) 19 O.R. (2d) 445). Moreover, though we are not bound by the strict wording of the Minister’s request (*Spar Aerospace Limited*, [1985] OLRB Rep. Mar. 480), we feel that in the circumstances of this case, this question - whether a collective agreement exists between Beacon and the Teamsters - is the issue we should address as being a critical factor in the exercise of his discretion under section 44(4) of the Act.

9. The successor rights provisions of the Act were introduced in response to the findings of the *Report of The Royal Commission on Labour-Management Relations in the Construction Industry*, (H. Carl Goldenberg, Commissioner, (1962)), that in the absence of specific legislative authority, privity of contract applies to prevent the imposition of terms negotiated and agreed to by one party upon a successor to that party. Although it is agreed that collective agreements are unique contractual arrangements and that they are not generally to be interpreted or applied in accordance with ordinary common law doctrines of contract law, it is difficult in these circumstances to see how, in the absence of a statutory remedy, any rules of interpretation can apply to bind a party such as Beacon to a document to which it was not a party. It is true that bargaining unit employees, who are not signatories to a collective agreement, are bound by the agreement. But these persons are bound by virtue of legislative provisions (such as section 50 of the *Labour Relations Act*), not by virtue of contractual provisions analogous to Article 39. To the extent that the notion of privity of contract has not been abrogated by statutory provisions to the contrary, it applies to preserve contractual rights either to enter into, or not to enter into an agreement.

10. In this case, Beacon has never entered into an agreement, voluntary or otherwise, with the Teamsters. It has not agreed to recognize the Teamsters as the bargaining agent for its employees. The agreement is between Humes and the Teamsters, and since Humes is a federally regulated corporate entity, its labour relations activities fall outside the ambit of the *Labour Relations Act*. These two parties cannot by a provision such as Article 39, bind a third party to their contract without that actual or ostensible authority. Beacon is and has been a separate legal entity since 1981, operating under provincial jurisdiction and outside the collective agreement entered into between Humes and Beacon. Absent applicable successor rights legislation, Beacon cannot be construed to be a party to the Humes' collective agreement in the circumstances of this case.

11. We therefore find that there is no collective agreement between Beacon and the Teamsters and, accordingly, in this case the Minister's discretion should be exercised by not appointing an arbitrator.

1721-87-R Sheet Metal Workers' International Association, Applicant v. Black & McDonald Limited, Respondent

Certification - Construction Industry - Practice and Procedure - Request for hearing by respondent denied - Short duration of employment not relevant to Board's considerations - Certificates issuing

BEFORE: *N. B. Satterfield*, Vice-Chair, and Board Members *D. A. MacDonald* and *J. Redshaw*.

DECISION OF THE BOARD; October 22, 1987

1. In this application for certification the applicant filed two combination applications for membership and receipts. The combination applications for membership are signed by the employees and the receipts are countersigned and indicate that a payment of \$1.00 has been made within the six-month period immediately preceding the terminal date of the application. The money was collected by more than one person. The applicant also filed a duly completed Form 80, Declaration Concerning Membership Documents, Construction Industry.

2. The respondent filed a reply, a list of employees and specimen signatures within the time fixed in accordance with the *Labour Relations Act* and the Board's Rules of Procedure. The reply was completed in paragraph 14(3) so as to request a hearing before the Board.

3. The respondent's reasons for requesting a hearing of the application were set out in an attachment to the reply and are as follows. This application was made when the respondent had engaged two sheet metal workers on a single project for a brief period of time because of a singular set of circumstances. According to the respondent, the fabrication and installation of sheet metal work "... has not and will not be a part of [the respondent's] ongoing business." and the respondent has no intention "... now or in the foreseeable future ..." of pursuing such work. The respondent submits that, because of the singular circumstances which caused it to undertake sheet metal work on one project and because the respondent previously has not engaged in such work and has no intention of being engaged in such work in the future, "... the application for certification is unjustified ... and should be dismissed."

4. The Board has the discretion under section 102(14) of the Act to decide the merits of an application for certification made under the construction industry provisions without the need to hold a hearing. Assuming to be true everything in the respondent's stated reasons for requesting a hearing, the Board finds it unnecessary to hold one into this application. The need for a hearing usually arises when there is a dispute about some material fact or one of the parties to the application raises an issue about which the Board requires further submissions from the parties before it can decide the issue. The materials filed by both the applicant and the respondent contain the facts which are essential for the Board to decide the application without a hearing and they are not in conflict.

5. The fact that the respondent does not usually employ sheet metal workers as part of its ongoing business and had employed two only for a brief period of time and only because of a singular set of circumstances are of no consequence or relevance in an application for certification. When an application for certification is brought properly under section 144(1) of the Act, as this one is, that section and section 7 of the Act require the Board to determine the unit of employees that is appropriate for collective bargaining, ascertain the number of employees in the unit and the number of those employees who are members of the applicant, all at a particular point in time. The composition of the bargaining unit in the instant case is mandated by section 144(1). Because employment attachments in the construction industry fluctuate and characteristically are relatively short-lived, the Board makes these determinations based on employees who were at work on the date of the making of the application. In view of the fact that the Act requires the Board to make them at a particular point in time, the Board does not consider matters of the duration of employment or the chances of future employment to be relevant to those determinations.

6. Nor do the factual circumstances on which the respondent seeks to rely affect the question of whether the applicant should be certified. Subsection 2 of section 7 of the Act requires the Board to direct the taking of a representation vote if not less than forty-five per cent and not more than fifty-five per cent of the employees in the bargaining unit are members of the trade union, and gives it the discretion to direct the taking of a representation vote if more than fifty-five per cent of the employees are members of the trade union [section 7(2)]. The Board must certify the trade union if a representation vote has been taken and more than fifty per cent of the ballots cast are cast in favour of the unit or if no representation vote has been taken and the Board is satisfied that more than fifty-five per cent of the employees in the bargaining unit are members of the union.

7. The remaining ground for requesting a hearing, then, is whether the respondent's claim that "... the application for certification is unjustified ... and should be dismissed" in the circum-

stances summarized above at paragraph 3, and set out more particularly in the statement appended to the reply, is an issue on which the Board requires to hear and consider the submissions of the parties. The claim clearly is not relevant to the questions posed by sections 144 and 7 referred to in paragraphs 5 and 6 above. The factual basis for the claim does not raise any ground which would give the Board a legal basis for dismissing the application as requested. The question then is whether the claim that the application for certification is unjustified has any relevance to the exercise of the Board's discretion whether to direct the taking of a representation vote in circumstances where it is satisfied that more than fifty-five per cent of the employees in the bargaining unit are members of the trade union. The Board normally would exercise its discretion to direct a representation vote where more than fifty-five per cent of the employees were members of the trade union if there were circumstances which caused it to want confirmation that the members of the trade union still wished to be represented by it; in other words, in circumstances where the Board for some reason was not prepared to rely entirely on the membership evidence.

8. The claim that the application for certification is unjustified and the basis on which the claim has been made do not raise that kind of question. The respondent seems to be saying the applicant should be prevented from being certified under the Act because of the singular circumstances which caused the respondent to employ sheet metal workers when it has not done so before and does not intend to do so again. The Act gives employees the freedom "... to join a trade union of [their] own choice and to participate in its lawful activities." It also gives trade unions the right to seek certification on behalf of employees who are exercising their choice. To deprive the applicant of certification because the employees whom it seeks to represent were only briefly employed and might not be employed again by the respondent would be improper and unjustified. Nor would it be proper or justified to prevent the employees from being represented by the applicant, if that is their wish, because of those circumstances. To the extent that the respondent's claim arises out of its concern for the future impact of certification on the conduct of its business, it is not the Board's function to consider such future impact in fulfilling the requirements of sections 144 and 7 of the Act, except possibly in deciding the description of the appropriate bargaining unit. See *Sinclair Cut Stone and Construction Company Limited*, 52 CLLC ¶17,009 and, more recently, *Guelph Beef Center Inc.*, [1977] OLRB Rep. March 184, at paragraph 20.

9. In all of these circumstances and for the reasons set out above, the Board is satisfied that the reply does not disclose a dispute over any material fact or any issue about which the Board needs the submissions of the parties before deciding, which would be reason for the Board to hold a hearing into the application. The Board is satisfied also that the reply does not disclose any useful purpose which would be served by holding a hearing. Therefore the Board will determine the merits of this application for certification without holding a hearing into it pursuant to its discretion under section 102(14) of the Act.

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[Remainder of decision omitted: Editor]

0204-87-U Winston Alfonso Blair, Complainant v. United Steelworkers of America, Respondent v. Midas Canada Inc. and International Parts Manufacturing Limited, Intervener

Duty of Fair Representation - Unfair Labour Practice - Complainant represented at an arbitration hearing by a union staff representative - Discharge upheld - Union not breaching duty by not hiring a lawyer for arbitration - Complaint dismissed

BEFORE: *Michael Bendel*, Vice-Chair.

APPEARANCES: *Winston Alfonso Blair* on his own behalf; *Marion Korn, Gerry Barr, Ed Pestano* and *Roy Jerome* for the respondent; *Paula M. Rusak* and *James Denny* for the intervener.

DECISION OF THE BOARD; October 23, 1987

1. This is a complaint under section 89 of the *Labour Relations Act*, in which the complainant alleges that the respondent has violated section 68 of the *Act*.

2. The complaint, as filed by the complainant, who was not legally represented in this proceeding, names certain union officers as respondents. It is clear from the language of section 68 of the *Act* that only a trade union owes a duty of fair representation. Although no objection was taken to the form of the proceeding nor any amendment sought, the trade union against which the substance of the complaint was directed and which was represented at the hearing is hereby substituted for the union officers as respondent.

3. The complaint relates to the manner in which the complainant was represented at an arbitration hearing into his discharge from employment with the intervener.

4. The complainant was represented at the arbitration, as well as in a grievance meeting with the employer, by Mr. Gerry Barr, a staff representative with the respondent, who was assisted by the president of the local and the chief steward. Mr. Barr was an experienced union representative whose regular duties included representing members at arbitration. He had participated in regular training sessions for union representatives run by the respondent.

5. The intervener's ground for the discharge was the complainant's admitted act of theft. The items stolen, which the complainant regarded as scrap, were of nominal value. The complainant had some 16 years of service to his credit, free of any prior discipline that the employer could invoke.

6. Mr. Barr testified that his approach to the arbitration was to stress the rehabilitative potential of the complainant. The employment relationship, he argued, was salvageable. He emphasized the many positive features in the complainant's work history, including his contribution to the health and safety committee. He had researched the arbitral case-law and he cited pertinent cases to the arbitrator.

7. The complainant had discussed his case in advance of the hearing with Mr. Barr and he was present at the hearing. He did not raise any objections at the time to Mr. Barr's handling of the case. Mr. Barr acknowledged that he may not have explained his strategy to the complainant.

8. The complainant testified that he left the arbitration hearing with the feeling that Mr. Barr had not done a proper job of representing him. He recalled that a union meeting had recom-

mended that he be represented by a lawyer. He felt that he himself could have done a better job before the arbitrator than Mr. Barr. Specifically, he was of the view that Mr. Barr should have relied on the employer's failure to impose the penalty of discharge in other cases which he regarded as comparable. The complainant did not believe he had been the victim of bad faith or discrimination by the respondent.

9. The arbitrator dismissed the grievance in a decision dated March 18, 1987. His complaint to the Board, dated April 8, was filed on April 22, 1987.

10. In his submissions to the Board, the complainant's main contention was that Mr. Barr's presentation to the arbitrator was not persuasive and gave the arbitrator no real basis for allowing the grievance. He felt that he should have been legally represented.

11. Ms. Korn, counsel for the respondent, noted that the complainant was not alleging bad faith or discrimination by the respondent. She argued that since Mr. Barr had obviously put his mind to the best approach to the representation of the complainant, the respondent's representation of the complainant could not be characterized as arbitrary. She contended that Mr. Barr had done a good job of representing the complainant even if the result was unfavourable. Citing the decision in *Conestoga College of Applied Arts and Technology*, [1983] OLRB Rep. June 882, Ms. Korn maintained that the respondent, which was in the practice of using union representatives in arbitrations, was under no obligation to retain a lawyer for the complainant's arbitration.

12. In my view, the evidence does not support a finding that the complainant received representation that can be described as "arbitrary, discriminatory or in bad faith" so as to put the respondent in violation of section 68 of the *Act*. His case against the respondent, at the most, is that with a lawyer as his representative he might have achieved a more favourable result. As noted by counsel for the respondent in her submissions, a complete answer to this contention is to be found in the decision in *Conestoga College, supra*, where the Board said the following (at page 886):

It is not the function of this Board in a section 89 complaint based upon section 68, to "second guess" an experienced union official in the presentation of an arbitration case on behalf of a complainant, nor is it the Board's function to impose a duty upon a trade union to retain a lawyer to represent it before an arbitration board where, in accordance with its normal practice, it assigns the case to a member of its staff experienced in presenting such cases.

13. For these reasons, the complaint is hereby dismissed.

3546-86-FC Labourers' International Union of North America, Local 1059, Applicant v. Co-Fo Concrete Forming Construction Limited, Respondent

First Contract Arbitration - Union certified pursuant to section 8 following employer unfair labour practices - Employer refusing to provide the union, when requested, with the names, addresses, telephone numbers and hourly rates of the employees in the unit - Employer resisting a union security clause for more than 15 months - Failure of communication between employer's representative at the bargaining table and the decision-maker who was not at the table - Process of collective bargaining unsuccessful for reasons set out in section 40a(2)(a), (b) and (c) - Direction to settle first collective agreement by arbitration

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *I. M. Stamp* and *J. Redshaw*.

APPEARANCES: *L. A. Richmond*, *C. Pike* and *J. MacKinnon* for the applicant; *Peter F. Chauvin*, *Mike Dzaidura* and *Marie Mischak* for the respondent.

DECISION OF THE BOARD; September 29, 1987

1. On March 31, 1987, the applicant trade union applied under section 40a of the *Labour Relations Act*, R.S.O. 1980, c. 228, as amended by S.O. 1986, c. 17, ("the Act") for a direction that a first collective agreement between it and the respondent employer be settled by arbitration. We heard evidence and argument with respect to that application on April 15, 16, 21 and 22, 1987. At the conclusion of the hearing on April 22, 1987, we delivered the following decision:

We are satisfied that collective bargaining between the parties has been unsuccessful for reasons enumerated in subsection 40a(2) of the *Labour Relations Act*. We therefore direct the settlement by arbitration of a first collective agreement in this matter. Reasons for this decision will be delivered at a later date.

We set out here our reasons for that decision.

I

2. The employer is engaged in the concrete forming business in the London area. In late June 1985, the union applied under the construction industry provisions of the Act for certification with respect to construction labourers employed by the respondent. Shortly thereafter, it filed unfair labour practice complaints under section 89 concerning the respondent's terminations of the employment of two of its employees for union activity and amended its application for certification to claim in the alternative under section 8 of the Act.

3. A different panel of the Board ("the first panel") heard the complaints and certification application together on August 14 and October 29 and 30, 1985. At the conclusion of the hearing, that panel ruled orally that the union would be certified under section 8 of the Act as exclusive bargaining agent for construction labourers employed by the respondent. It also directed that the two discharged employees be offered reinstatement and that they be compensated for losses arising out of their discharges. The first panel's written certification decision was issued on May 9, 1986. It was accompanied by two certificates in accordance with section 144(2) of the Act: one certifying the applicant as bargaining agent for construction labourers in Board Area 3 excluding the ICI sector, and the other certifying the applicant, on its own behalf and on behalf of all other affiliated bargaining agents of the designated employee bargaining agency, as bargaining agent for construction

labourers in the ICI sector in the Province of Ontario. The first panel's written decision with respect to the section 89 complaints, which set out the panel's reasons for certifying the applicant without a vote under section 8, was issued on April 9, 1987, after this application was filed.

4. In its decision of April 9, 1987, the first panel observed that the evidence it had heard from the two management witnesses, including that of the respondent's president, Mike Dziadura, "was little more than a string of lies intending to mislead the Board." The panel determined that Louis Kotor, an employee of the respondent for 14 years, had not quit, as the respondent claimed, but had been dismissed by the respondent for union activity during the union's organizing campaign. It found that Mr. Dziadura had threatened to close down the business if it was organized by the trade union. It also found that "the termination of Kotor was tied to his union activity as far as the rest of the work force was concerned" and that "both Mr. Koza and Mr. Dziadura made sure that the work force was aware of the tie in." It concluded that the effect on the rest of the work force of such a termination of a senior employee had been to cut short the union's organizing campaign at a point at which it had signed up almost fifty percent of the employees.

5. While the written decisions of May 9, 1986 and April 9, 1987 say nothing about a notice to employees, we accept the applicant's uncontradicted evidence that the first panel did say, at the hearing of October 30, 1985, that the respondent would be required to post notices to employees with respect to the unfair labour practice complaints and their outcome in the English, Portuguese and Polish languages. In the result, such notices were never sent to the respondent for posting and, so, were never posted.

6. The parties first met for the purpose of collective bargaining on November 18, 1985. The union's business manager, Jim MacKinnon, gave Mr. Dziadura copies of the provincial agreement covering employment of construction labourers in the ICI sector (by which the respondent had become bound by operation of law as a result of the certification), literature describing the union's pension and welfare benefits and the union's collective agreement with another London concrete forming contractor, Rockwall Concrete Forming (London) Limited ("the Rockwall agreement"). Mr. MacKinnon stated that the union was seeking a collective agreement similar to the Rockwall agreement, and explained the provisions of that agreement. Not unexpectedly, the parties reached no agreement at this meeting, other than to meet again after the formal certificates were received from the Board.

7. The employer's first proposal was sent to the union by mail in February 1986. It differed from the union's in a number of respects. Mr. MacKinnon felt the next bargaining meeting ought to be under the auspices of a conciliation officer, but his application for conciliation could not be processed until the Board had issued formal certificates, which awaited the release by the Franks panel of a written decision. The necessary decision and certificates were issued in May 1986, and the parties' meeting with a conciliation officer took place on June 5, 1986. Consistent with section 111 of the Act, the only evidence we received about this meeting concerned direct "face to face" discussions between the parties (see *Shaw-Almex Industries Limited*, [1984] OLRB Rep. Jan. 109). For the most part, those discussions focused on the employer's proposal.

8. From the perspective of this application, one of the more significant exchanges at the meeting of June 5, 1986 concerned the wage rates set out in the employer proposal. Mr. MacKinnon suggested to Mr. Dziadura that the rates set out in his proposed collective agreement were lower than the actual rates then being paid to some of the employees to whom those proposed rates would apply. To the apparent surprise of his legal adviser, Mr. Dziadura admitted this. He did not, however, revise the employer's wage proposal at that meeting. Another exchange of significance concerned this sentence in the employer's proposed article on Travel and Room and

Board: "Where the Employer provides a vehicle to an employee for transportation during the course of work, the vehicle must be used only in the course of work and must be returned promptly on the completion of work." At the time, the employer had a practice of allowing certain employees to take company trucks home after work and drive them to work the following day. The employees who were allowed to do this drove others home after work and picked them up on the way to work. While acknowledging the employer's right to do as it wished with its trucks, the union saw the employer's proposal for a collective agreement provision *prohibiting* the current practice as a penalty for employees if they achieved a collective agreement -- a loss of benefit for which the union would appear responsible. It asked that the sentence be deleted, stating that the use of its trucks would then be a matter on which the employer would be unrestrained by the collective agreement. The explanation Mr. Dziadura gave for this proposal at that time was "if I have to pay Rockwall wages, the trucks stay in the yard." At no time did the company offer to pay "Rockwall wages", nor did it ever withdraw this aspect of its proposal or offer any further or other justification for it.

9. The meeting of June 5, 1986 ended without either side's having indicated a willingness to compromise on any major issue. Over the next three months, the union considered putting pressure on the employer by means of a strike or picketing. On the basis of information from his contacts, Mr. MacKinnon concluded, not unreasonably, that there was not sufficient employee support for either such action. This was not surprising in the circumstances. The union's original support had been eroded and diluted over time by employee turnover. The remaining original union supporters were "scared", Mr. MacKinnon said. The chilling effect of the earlier firing of workers for union activities would not have been relieved by subsequent events: the remaining employees did not see the discharged employees return to work (the latter having chosen not to return to despite the Board's oral ruling), nor did they ever see the notices in three languages which the union had told them would be posted. The respondent's employees worked in roving crews of four to six men moving from place to place pouring house basements; it would be relatively difficult to effectively picket several such small, moving workplaces. Lack of significant employee support for any strike compounded that difficulty; so did the low level of unemployment among union members, which limited the number of persons available to man picket lines.

10. Mr. MacKinnon requested a further bargaining meeting in a letter to the employer dated September 23, 1986. The employer's lawyer responded by letter dated October 8, 1986, the gist of which was that while the employer was willing to meet, it feared nothing would be accomplished if the union was not prepared to change its position. The union then retained a lawyer. Negotiations proceeded in a series of telephone conversations and letters between the parties' lawyers. There was a further meeting of representatives of the parties on February 12, 1987. This was followed by another exchange of lawyers' correspondence, during which the union's lawyer indicated that an application for first contract arbitration would be made. Between September 1986 and March 1987, some issues were resolved and some explanations were given with respect to positions on outstanding items. While these further negotiations narrowed the number and range of disputed items, they did not result in a collective agreement.

11. In his letter of November 17, 1986, to the employer's lawyer, the union's lawyer wrote:

This is to confirm our telephone conversation of November 11, 1986.

At that time, you indicated to me that you would reply in writing by November 21, 1986, to Mr. MacKinnon's letter of September 23, 1986. You also indicated to me that you would outline to me the problems your client has with the proposed collective agreement. We both agreed that it would be more fruitful for future negotiations for the union to have your reply to that letter prior to a proposed collective agreement being forwarded to you.

My client has advised me that your client has been advertising for labourers, and undoubtedly now has a work force quite different from the time of certification. In order to ensure that the existing work force has the opportunity to consider a proposed collective agreement that may be tentatively arrived at, it will be necessary for my client to contact these people. Moreover, I understand that your client will be requesting that its present work force ought to be admitted into membership in the union. In order to admit any of these persons into membership, it will be necessary to know who they are.

Accordingly, *I request that you supply me in writing with the names, addresses and telephone numbers of all construction labourers employed by your client, together with their current hourly rate.* The hourly rate information is required to make a reasonable evaluation of your monetary proposal.

Please provide this information as soon as possible, and no later than Wednesday, November 26, 1986.

If you have any questions regarding this matter, or I can assist you in any way, please do not hesitate to contact me at your earliest convenience.

[emphasis added]

In his letter of November 25, 1986, the employer's lawyer offered a rationale for its position on certain issues. With respect to the request contained in the November 17th letter from the union's lawyer, he wrote:

I have just recently received your letter dated November 17, 1986. I have requested the employer to provide me with the information requested therein. I will respond to your letter as this information becomes available.

In a letter to the employer's lawyer of January 6, 1987, the union's lawyer noted that his request of November 17, 1986, had not been answered, and asked whether or not the employer intended to provide the requested information.

12. At the meeting of February 12, 1987, the employer told the union the range of wage rates it was paying in each of its job classifications and the number of employees in each classification, but not the names of and specific wage rates of each employee. In his letter of March 17, 1987, the union's lawyer again asked for the names of the employees in the unit it represented. The employer never provided the information requested in the union lawyer's letter of November 17, 1986. There is no evidence of the employer's reason for either failure. In argument, its counsel invited us to conclude that the employer had refused the detailed information requested in the letter of November 17, 1986 because it felt the information it gave at the meeting of February 12, 1987, was sufficient to enable the union to bargain.

13. There were fourteen or fifteen different collective agreement articles and appendices remaining in dispute when this application was filed. The major ones concerned classifications and wages, benefits, union security and subcontracting. The draft collective agreement included with the employer's reply indicated further movement on one issue. The union delivered a further proposal the day before the hearing of this application began and, after our hearings commenced, the parties made some additional attempts to settle a collective agreement and, thus, this application. Those attempts were unsuccessful. Consistent with the privilege which normally attaches to settlement discussions, the only evidence we have heard about the negotiations which took place after this application was filed is the evidence which the parties agreed could be put before us.

14. The employer's only witness was Marie Miszczak, the administrative assistant (and daughter) of Mike Dziadura, who is President of the employer corporation. She was put forward as

being a person who could describe the employer's business and explain the positions it had taken in collective bargaining. She claimed to have participated in the formulation of the employer's bargaining position throughout. Taking that at face value, a number of aspects of her testimony left us in some doubt about the process by which the respondent formulated its positions. For example, Ms. Miszczak testified that she knew no details about the union's welfare and pension plans (to which the employer would make benefit payments under the union's proposal) and had never been told about or shown the literature which, according to Mr. MacKinnon's uncontradicted evidence, was given to Mr. Dziadura in the presence of his lawyer in November 1985. Ms. Miszczak also testified that the employer's opposition to the union's proposal that all employees be required as a condition of employment to be and remain union members was based on a belief that such a requirement would violate section 70 of the *Labour Relations Act*. She said that this was the employer's belief from November 1985 until it was advised otherwise by its lawyer in early April of 1987 during preparation of its reply to this application (which she says was the first time this concern about section 70 was raised with the lawyer). When she also testified that the union's proposed union security clause had ultimately been accepted, the employer's counsel suggested to her that that was incorrect, drawing her attention to the employer's reply to this application, which showed that that article was still in dispute.

15. In its reply to this application, the employer gave this explanation for the position it took in February 1986 on the union's proposed union security clause:

The Respondent's collective agreement did not contain a Union hiring hall provision. Nor did the Respondent's collective agreement contain a clause requiring membership in the Union. The Respondent's collective agreement did not contain these provisions because the Respondent had been told by Mr. Jim McKinnon that the Applicant would not accept into membership many of the Respondent's employees who the Applicant considered to be unskilled and unqualified.

The allegation that the union sought restriction of employment to union members while denying membership to persons employed in the unit for which it had been certified is a very serious one indeed. In his testimony, Mr. MacKinnon denied having said that any employee would be refused membership in the union. The employer called no witness to contradict Mr. MacKinnon or otherwise explain its having made this allegation. In response to the appearance of this allegation in a letter of November 25, 1986 from the employer's lawyer, the union's lawyer very clearly stated in his letter of January 6, 1987 that the union would admit existing employees into membership and noted, as he did again in his letter of March 17, 1987, that the union would need to know who those employees were. Even if we charitably suppose that the employer misunderstood the union's position in November of 1986 despite the contents of the letter of November 17th from counsel for the union (quoted in paragraph 11 above), we cannot suppose that such a misunderstanding continued after the letter of January 6, 1987 was delivered. We note that that letter also indicated that the union was abandoning the request for a hiring hall provision. The employer's continued resistance thereafter to the remaining aspects of the union's proposal on union security was left entirely unexplained, both at the bargaining table and by Ms. Miszczak's testimony.

16. Ms. Miszczak's explanation for the respondent's resistance to the union's proposed "no subcontracting" clause was that under that clause it could not continue its existing practice of contracting out certain aspects of its work, particularly dampproofing and floor finishing, to non-union contractors. The language of the clause proposed by the union is less clear than it could be. It could be interpreted as prohibiting any subcontracting of work to non-union contractors. It could also be interpreted as permitting such subcontracting when the subcontracted work is not work which was normally performed by the employer's workforce at the time the agreement was signed, as would be the case with work which the employer had an existing practice of subcontracting. Mr.

MacKinnon testified that the latter interpretation is the union's interpretation, and that he had explained this to Mr. Dziadura and the employer's lawyer during bargaining. As Mr. MacKinnon did not attend the bargaining meeting in February 1987, this explanation must have been given at either or both of the meetings on November 18, 1985 and June 5, 1986. Ms. Miszczak was not present at either of those meetings. She could not and did not contradict Mr MacKinnon's evidence that the employer's President knew early in negotiations that, on the union's view of the matter, it would be able to continue its existing subcontracting practices under the union's proposed subcontracting clause. She says only that she was not aware that the union had this interpretation of the clause until she heard Mr. MacKinnon's testimony at the hearing of this application.

II

17. Subsections 1 and 2 of section 40a of the Act provide:

40a.-(1) Where the parties are unable to effect a first collective agreement and the Minister has released a notice that it is not considered advisable to appoint a conciliation board or the Minister has released the report of a conciliation board, either party may apply to the Board to direct the settlement of a first collective agreement by arbitration.

(2) The Board shall consider and make its decision on an application under subsection (1) within thirty days of receiving the application and it shall direct the settlement of a first collective agreement by arbitration where, irrespective of whether section 15 has been contravened, it appears to the Board that the process of collective bargaining has been unsuccessful because of,

- (a) the refusal of the employer to recognize the bargaining authority of the trade union;
- (b) the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification;
- (c) the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement; or
- (d) any other reason the Board considers relevant.

In *Nepean Roof Truss Limited*, [1986] OLRB Rep. July 1005, the Board made these observations about subsections 1 and 2 of section 40a of the Act:

16. It is clear from these provisions that the legislature has acknowledged the significance to the collective bargaining relationship of the first contract, and has given statutory recognition to the potential difficulties that may be encountered in achieving it. This remedy does not supplant the primacy of the free bargaining process; rather, it recognizes that the negotiation of the first agreement may sometimes be thwarted by unjustified intransigence. Although this is remedial legislation and should be given a liberal construction and interpretation, the scheme of section 40a does not envision the automatically imposed settlement of a first collective agreement in all cases where the parties are unable to negotiate one.

18. There are two sets of conditions precedent to an order directing that a first collective agreement be settled by arbitration. The first set of preconditions is found in subsection 1 of section 40a. Those preconditions focus on the formal stage which the parties' negotiations have reached -- they must be at or beyond the state at which a "no board" report has issued -- and the results of those negotiations -- "the parties are [still] unable to effect a first collective agreement." Subsection 2 sets out as a second precondition or set of preconditions that "it appears to the Board that the process of collective bargaining has been unsuccessful because of" one of the reasons described in subparagraphs (a) through (d) of subsection 2. Verbalization of one idea in two different ways is good form in creative writing, but not in legislative drafting. When the legislature uses

two different words or phrases it is presumed to mean two different things. It cannot be supposed, therefore, that the phrase “the process of collective bargaining has been unsuccessful” in subsection (2) is a mere restatement of the preconditions already set out in subsection (1). In *Teledyne Industries Canada Limited*, [1986] OLRB Rep. Oct. 1441 the Board concluded (at paragraph 25) that “the mere fact that a collective agreement has not yet been achieved is not determinative of the question of whether or not the *process* has been unsuccessful.” This is also the necessary implication of the Board’s statement in *Juvenile Detention (Niagara) Inc.*, [1987] OLRB Rep. Jan 66, (at paragraph 20) that “...it is too early to say that [the process of collective bargaining] has been *unsuccessful* at all...” even though the application there satisfied the criteria set out in subsection 40a(1).

19. If the phrase “the process of collective bargaining has been unsuccessful” does not mean merely that no collective agreement has been effected, what does it mean? One possibility is that the word “because” which connects that phrase with subparagraphs (a) through (d) is definitional, as in the statement: “this substance appears to be water because each of its molecules consists of two atoms of hydrogen and one atom of oxygen.” If the word “because” were definitional, then the only precondition subsection (2) would impose is the existence of one of the conditions described in subparagraphs (a) through (d). On that view, the actual effect on the parties’ collective bargaining of any particular manifestation of one of those conditions would be entirely irrelevant. This does not seem a particularly sensible result. A definitional interpretation of the word “because” was implicitly rejected in *Nepean Roof Truss Limited*, *supra*, when the Board concluded that the use of the word “because”

...makes it clear that section 40a contemplates a cause-and-effect oriented assessment. Unless the applicant can demonstrate that the reason for the unsuccessful process is the employer’s refusal to recognize the union’s bargaining authority, the respondent’s unreasonably uncompromising bargaining proposals, the respondent’s dilatory or unreasonable efforts to reach an agreement, or any other reason the Board deems relevant, then notwithstanding the failure to conclude an agreement, the Board is not entitled to direct its imposition. In the infancy of this legislation, it has yet to be determined what other reasons the Board may consider relevant within the meaning of section 40a(2)(d), but logic and the spirit of section 40a suggest that this will involve a case-by-case analysis of whether there is a causal connection between the “reason” in question and the failure of the collective bargaining process.

20. In short, the phrase “the collective bargaining process has been unsuccessful” is not defined. Nevertheless, the context in which it appears does tell us some things about the quality of success which must appear to the Board to be present before an application under subsection 40a(1) has any hope of success. As we have already observed, that context tells us that this quality of success is not something that will necessarily be present when a “no board” report issues. It also tells us that success is something that can be caused by one of the conditions described in subparagraphs (a) through (d) of subsection 40a(2) and, importantly, that success can also come about in the complete absence of any of those factors. Finally, the context tells us that the mere existence of this quality of success is not reason enough to direct first contract arbitration. As with the language of subparagraph 40a(2)(d), the precise meaning of the phrase “the collective bargaining process has been unsuccessful” will have to be elaborated on a case by case basis as the Board forms judgments in each case about whether negotiations have reached a point at which they could fairly be described as “unsuccessful”.

III

21. Counsel for the respondent argued that the process of collective bargaining has not been unsuccessful in this case. In the alternative, he argued that any lack of success has been caused by hard bargaining, particularly the union’s insistence that the respondent must agree to the

same monetary terms as other employers in the London area, and not by any of the factors listed in subparagraphs (a) through (d) of subsection 40a(2).

22. With respect to his first argument, counsel cited *Teledyne Industries Canada Limited*, *supra* in which the Board made these observations at paragraphs 25 and 26:

25....We are not satisfied that it is accurate to say that the process of collective bargaining in which this trade union and this company have engaged has been unsuccessful. Though there is no minimum requirement in that respect, the number of actual bargaining sessions between the parties was relatively low. Notwithstanding that and the misunderstandings that arose as a result of the relative inexperience of the individuals involved in the negotiations and the lack of structure in the negotiations, the parties have made substantial progress. It is true that three important issues between the parties remain unresolved. However, collective bargaining is a process and the mere fact that a collective agreement has not yet been achieved is not determinative of the question of whether or not the *process* has been unsuccessful. In our view, the collective bargaining process between these two parties has not been allowed to take its full course. The parties have not fully discussed the remaining issues; they have hardly bargained or attempted to bargain on the matters still outstanding between them and we are not satisfied that bargaining is at an impasse.

26. We therefore find that the process of collective bargaining in which these two parties have engaged has not been unsuccessful. Subsection 40a(2) requires that the Board be satisfied that the collective bargaining process has been unsuccessful before it enquires further into the reasons for the inability of the parties to effect a first collective agreement. Consequently, we need not deal with whether or not any bargaining position adopted by the respondent has been either uncompromising or, if so, whether any of the uncompromising positions were adopted without reasonable justification. Nor need we deal with any of the other reasons suggested by the applicant.

There having been a number of articles agreed to in the case before us after only three actual bargaining meetings, counsel for the employer asked us to conclude that the process of collective bargaining had not been unsuccessful at the time this application was filed.

23. While there had only been three face to face meetings by the time this application was filed, negotiations had also proceeded or been attempted by way of written correspondence. We see no reason to limit ourselves to considering only face to face meetings in assessing whether negotiations have been “unsuccessful”. The appropriate inquiry is: what has or has not been discussed, when and with what results? One’s sense of how long any particular set of negotiations would ordinarily be expected to take cannot be determinative; “unsuccess” may be precipitated prematurely by one of the factors described in subparagraphs (a) through (d) of subsection 40a(2).

24. Counsel for the employer argued that this Board should take the same view of section 40a of the Act as the British Columbia Labour Relations Board took of that province’s first contract provisions in the following passages of its decision in *Grandview Industries Limited*, [1974] 1 Can. LRBR 140 at pages 143 and 145:

...Even parties who are both quite willing to agree on terms each considers plausible may fail to do so. The union may be strongly committed to basic standards it has negotiated elsewhere and be unwilling to risk diluting them by accepting less in this unit. The employer may believe that these same terms are inappropriate for the special economic circumstances in which it operates. Both sides are genuinely prepared to sign a collective agreement but neither will budge from the position it feels is reasonable from its point of view. In our judgement, that is not the kind of case for which section 70 is designed.

In that situation, if we were to impose upon these parties our own opinion as to a reasonable settlement, we would be acting on the assumption that the Code guarantees that a collective agreement must be reached, and by compulsory arbitration as a last resort. The Code makes no

such promise, even in the case of first agreements. The primary method of resolving an impasse at the bargaining table remains the strike or the lockout. This Board is not prepared to dilute the force of that alternative which is a necessary constituent of collective bargaining. The immediate parties are much better able than an outside arbitrator to appreciate what is a fair and politic settlement of the dispute in their own particular circumstances. We must ensure that our administration of s. 70 does not distort their responsible search for that point.

• • •

In this case, Grandview's contract proposals were within range of existing settlements at its own operations in Rexdale, Ontario, with a different union, and at Canplas (another subsidiary of Noranda) in New Westminster, with this same Local of the Teamsters. The Teamsters preferred a very different kind of agreement, both as to language and as to money. The Teamster proposal is based on a contract framework it uses as a standard model in the many different operations in which it represents employees. Grandview is just not prepared to accept that model as realistic for its own special situation. There is nothing improper in the Teamsters' insisting on its proposals, as to compulsory union membership for example. One can understand why a union would want to prevent any erosion in principles which it has fought hard to attain. However, one can also understand why an employer may not want to see those principles inserted into its own situation, especially at the beginning of this relationship with the new union. When this is the type of stumbling block there is to agreement, neither party should be able to go to the Board and have us arbitrate the dispute. The statute contemplates a strike or lockout as the means of breaking that kind of deadlock.

Counsel for the respondent submitted that while resort to a strike is not a prerequisite to a union's application under section 40a in every case, it should be in circumstances of the sort described in the *Grandview* case. He argued that this is that sort of case, having regard to the applicant's insistence that the respondent agree to the terms accepted by other London area forming contractors and the respondent's insistence that different provisions are warranted because its business is different from the businesses of those other contractors.

25. In the *Grandview* case, the B.C. Board observed that:

In this case, Grandview did not threaten the bargaining authority of the Union, it did not oppose the certification application and asked only that the earlier status of the Steelworkers be dealt with (as it was, through a vote). No unfair labour practices were alleged nor were there any attempts to erode the Union position while the certification was proceeding. Once certification was received, bargaining began and the Employer has made monetary proposals for the Union to take back to its members. Certainly Grandview's representatives have taken a very firm stand on certain issues in the negotiations but this has not been due to any opposition to the idea of having a union in the plant.

The importance of these observations is highlighted by the B.C. Board's disposition (in the same decision) of the London Drugs application. There the employer had opposed the certification and fired a union supporter for reasons which the B.C. Board had earlier found to be an unfair labour practice. The B.C. Board explained its granting that application by the union for first contract arbitration at page 146 of the reported decision:

In reviewing the history, we find one clear and established unfair labour practice. In addition, the Employer skated very close to the line, if not over it, in talking to the individual employees, dealing with an Action Committee, and terminating a striking employee for the reasons given. We don't need to reach a final conclusion as to each of these specific allegations because we are not dealing here with unfair labour practice complaints. The point is that a pattern of conduct has taken place which has had an inevitable impact on the bargaining posture of both parties. We would note as well that the Union has not displayed totally clean hands in its response to the Employer's behaviour. In our judgement, the situation did reach an impasse which required action by the Board under s. 70 of the Code.

26. In *Juvenile Detention (Niagara) Inc.*, *supra*, the Board commented at paragraph 21 that

...section 40a neither requires, nor rules out, resort to a strike or lockout - the traditional levers in a collective bargaining process which recognizes the realities of economic power and is designed to elicit compromise, concessions and accommodation. A work stoppage may well be a relevant factor, just as the union's inability to mobilize effective pressure may be relevant - especially where it results from the employer's previous misconduct or the employer's intransigent and unreasonable bargaining stance. If there has been a collective bargaining break-down, the Board must carefully scrutinize the conduct and attitudes of both bargaining parties, to discern whether the impasse, while not amounting to bad faith bargaining, fits within section 40a(a)-(c), or involves circumstances which would warrant an exercise of the Board's discretion under section 40a(a)(2)(d)....

If it can be said that the issues remaining in dispute are of a sort which resort to the economic warfare of a strike or lockout was meant to resolve, that becomes an argument in favour of intervention under section 40a if, by its unlawful behaviour, the respondent to the application has undermined the ability of the applicant to engage in a strike or lockout. That is the situation in this case. The respondent's crude unfair labour practices led to the applicant's certification under section 8 of the Act. We have found that the chilling effect of those unfair labour practices was not ameliorated thereafter, and had the result that there was no bargaining unit support for a strike. As this factor was not in fact one of the affirmative reasons for our decision to direct first contract arbitration, it is enough to observe that the argument its counsel based on the analysis in the *Grandview* case did not assist the employer in the circumstances as we found them. It is unnecessary for us to decide whether in circumstances similar to those in *Grandview* this Board would take the same view of section 40a as the B.C. Board did of its legislation in the *Grandview* case.

27. In our view, a most significant feature of the parties' bargaining from the perspective of section 40a was the employer's refusal, when asked, to provide the union with the names, addresses, telephone numbers and hourly rates of the employees in the bargaining unit it represented.

28. A trade union's entitlement to the names and hourly rates of employees in the bargaining unit for which it is negotiating is well settled: *DeVilbiss (Canada) Limited*, [1976] OLRB Rep. Mar. 49; *Radio Shack*, [1979] OLRB Rep. Dec. 1220 (jud. rev. denied, in *Re Tandy Electronics Ltd.*, and *United Steelworkers of America et al.* (1980), 30 O.R. (2d) 29, 80 CLLC 14,017 (Ont. Div. Ct.), leave to appeal to Ontario Court of Appeal refused March 10, 1980); *Globe Spring & Cushion Co. Ltd.*, [1982] OLRB Rep. Sept. 1303; *Northwest Merchants Ltd.*, [1983] OLRB Rep. July 1138, 83 CLLC 16,055; *Consolidated Bathurst Packaging Ltd.*, [1983] OLRB Rep. Sept. 1411; *The Windsor Star*, [1983] OLRB Rep. Dec. 2147; *The Ontario Cancer Treatment and Research Foundation (Thunder Bay Clinic)*; [1985] OLRB Rep. May 705; and, *Forintek Canada Corp.*, [1986] OLRB Rep. Apr. 453. Once certified with respect to a bargaining unit, a trade union is the exclusive bargaining agent of and for *all* of the employees who fall within that unit from time to time, not just the employees who wish to be represented by it. With that right comes the obligation to fairly represent *all* employees in the bargaining unit, both in collective bargaining and in the administration of any collective agreement. It necessarily follows that it has both the right and the need to know the names and existing terms and conditions of employment of each of those employees.

29. The cases cited in the preceding paragraph do not expressly deal with requests for the addresses and telephone numbers of employees in the bargaining unit. The principles on which those decisions were based, however, support a union bargaining agent's entitlement to that sort of information as well. In *Globe Spring & Cushion Co. Ltd.*, *supra*, the Board cited with approval the observation of the British Columbia Labour Relations Board in *Noranda Metal Industries Limited*, [1975], 1 Can. LRBR 145 at 165 that:

“...one would hardly say that an employer who deliberately withheld factual data which a union needed to intelligently appraise a proposal on the bargaining table was making ‘every reasonable effort to conclude a collective agreement’.”

In *Consolidated Bathurst Packaging Ltd.*, *supra*, the Board observed that:

A bargaining agent can claim entitlement to information necessary for it to reach informed decisions and thereby to perform effectively its statutory responsibilities.

In making informed decisions and effectively performing its statutory responsibilities, information from the employees it represents can be as important to the trade union as the information the employer supplies. A trade union may need to communicate with some or all of the employees in the bargaining unit, including non-members of the union, in order to properly represent their interests: to get their input, to verify information supplied by the employer or to give notice of a strike or ratification vote (see ss. 72(4), (5) and (6) of the Act), for example. Information about how bargaining unit employees can be contacted is, thus, information to which the union is *prima facie* entitled.

30. It is hard to imagine what employer interest in such information could outbalance the union’s interest in the addresses and telephone numbers of the persons for whom it has the right and obligation to act as agent. In any event, it is unnecessary to speculate about whether there are some kinds of needed information which an employer is entitled to withhold because of countervailing interests: this employer identified no such purported countervailing interest, nor did it deny having any of the information sought -- it simply presumed to make its own assessment of the union’s need for the information. It is not for an employer to assess how much such information is or is not needed by its employees’ exclusive bargaining agent in order to properly represent those employees in bargaining. Having regard to the analysis in the decisions cited earlier, the employer’s failure to comply with the union’s request for the names, addresses, telephone numbers and wage rates of employees in the bargaining unit amounts to a “failure of the respondent to make reasonable ... efforts to conclude a collective agreement” within the meaning of subparagraph (c) of subsection 40a(2) of the Act and, even more fundamentally, also constitutes a “refusal of the employer to recognize the bargaining authority of the trade union” within the meaning of subparagraph (a).

31. If there can be a case in which a process of collective bargaining characterized by refusal of the employer to recognize the bargaining authority of a trade union can be described otherwise than as unsuccessful, this is certainly not that case. This employer’s very serious impropriety in failing to give the trade union information to which it was entitled was by no means an isolated instance of circumstances of the sort to which section 40a was meant to respond.

32. The respondent’s approach to the union’s proposals about union security reflect either adoption by the respondent of uncompromising bargaining positions without reasonable justification or failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement or both, depending on the view one takes of Ms. Miszczak’s evidence. If we accept the respondent’s representation that Ms. Mizszak’s views are the respondent’s views, then we have a respondent who resisted accepting a union security clause for more than fifteen months because it believed such a clause violated a section of the *Labour Relations Act*, but did not bother discussing that belief with the lawyer who was representing or advising it in collective bargaining throughout that period. That belief was not reasonable, nor was the failure of the respondent to discuss it with its legal adviser over a period in excess of 15 months. In any event, Ms. Miszczak was disabused of this belief before our hearings began and could not explain why the respondent continued to resist the union security clause being proposed by the union. The only explanation offered in bargaining

rested on the allegation that the union had said it would not take all employees into membership. As we have noted in paragraph 15 above, the evidence before us is to the contrary and, in any event, any concern of that sort was answered directly in January 1987. Again, apart from Ms. Miszczak's unreasonable belief about the effect of section 70 of the Act, there was no explanation given in bargaining or before us for the respondent's unchanged position thereafter.

33. More than once in her testimony, Ms. Miszczak confessed ignorance of bargaining table communications by the union which were objectively relevant to issues to which she attached importance -- the union's interpretation of the effect of its proposed "subcontracting out" clause on the respondent's existing practices, for example. Of course, Mr. Dziadura was at the bargaining table. He is the President of the respondent. Either he or the respondent's lawyer or both received the information of which Ms. Miszczak claims to have been unaware. If Ms. Miszczak was as integral to the respondent's collective bargaining decision-making as it would have us believe, then these failures of communication between the respondent's representatives at the bargaining table and a decision maker who was not at the table also constituted a "failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement" within the meaning of subparagraph (c) of subsection 40a(2) of the Act.

34. In the face of the union's position on the issue, the employer's continued insistence that any collective agreement prohibit an existing practice of employee use of its trucks demonstrated its desire to associate adverse consequences with unionization and collective bargaining in the minds of its employees (as did its proposal in June 1985 of wage rates lower than those enjoyed by some of the employees to whom the proposed rates would have applied). This is another example of adoption of an uncompromising bargaining position without reasonable justification and failure to make reasonable or expeditious efforts to conclude a collective agreement. It is also symptomatic of a continuation in the employer of the attitude which motivated the unfair labour practices it committed at the time the applicant was trying to organize its employees. At the time this application was filed, there was every reason to suppose that this attitude would continue to impede the collective bargaining process as envisioned by the *Labour Relations Act* in general and section 40a in particular.

35. For these reasons, we concluded that the process of collective bargaining between these parties had been unsuccessful for reasons set out in subparagraphs (a), (b) and (c) of subsection 40a(2) and, accordingly, directed the settlement of their first collective agreement by arbitration. In having done so, we should not be taken as having accepted the notion that by having the employer recognize the applicant trade union as exclusive bargaining agent for "all its construction employees engaged in all construction projects in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin" in the recognition clause of their collective agreement, these parties could themselves negotiate the terms and conditions of employment of any construction labourers who might be employed by the respondent in the industrial, commercial and institutional sector of the construction industry. As it was not put in issue before us, it was unnecessary for us to decide whether the Minister's Employee Bargaining Agency Designation of September 30, 1983, does or can at law have that effect, as was contended by the applicant's counsel in answer to a question from the Board. Our direction that the parties' first collective agreement be settled by arbitration would not, of course, authorize imposition by arbitration of an agreement which the parties are not legally competent to conclude themselves under the *Labour Relations Act*.

0377-87-R Leonardo Delprete, Raphael Lewis, Walter Mercsanits, Joannis Polemiotis, Mario Rago, Lorenzo Ritano, Nicola Rulli, Howard Bogues, Fabian Cormier, Douglas Wood, Gaspare Ferrante, Liberal Oliveria, Lionel Willie, Applicants v. Shopmen's Local Union No. 834 of the International Association of Bridge, Structural and Ornamental Ironworkers, Respondent v. **Connie Steel Products Limited**, Intervener

Charter of Rights and Freedoms - Termination - Timeliness - Application for termination made after the appointment of a conciliation officer - Argument that trade union has an obligation to advise the employees in the unit of its intention to apply for the appointment of a conciliation officer because that cuts off open period for termination applications rejected - Charter argument relating to freedom of association not entertained because Attorneys General had not been notified - Termination application dismissed as untimely

BEFORE: *Ken Petryshen*, Vice-Chair, and Board Members *G. O. Shamanski* and *H. Kobryn*.

APPEARANCES: *Leroy A. Crosse* for the applicants; *Roy B. Sim*, *Harry Colpitts* and *Wilbert Dove* for the respondent; *Peter Israel*, *Blake Gross* and *Brian Gross* for the intervener.

DECISION OF THE BOARD; October 20, 1987

1. This is an application under section 57 of the *Labour Relations Act* for a declaration that the respondent trade union no longer represents the employees of Connie Steel Products Limited in the bargaining unit for which it is the bargaining agent.

2. After determining the facts and entertaining submissions from counsel for the applicants, and after recessing to consider the matter, the Board made the following oral ruling at the hearing on July 6, 1987:

The respondent and the intervener were bound by a collective agreement which expired on December 31, 1986. An application for conciliation services was made by the respondent on April 15, 1987. The appointment of a conciliation officer was made on April 29, 1987. This application was filed with the Board on May 7, 1987. The respondent has taken the position that this application is untimely.

Counsel for the applicants made a valiant attempt to convince the Board that it should not treat this application as being untimely. After giving careful consideration to the submissions of counsel for the applicants, the Board finds that this application is untimely. Accordingly, the application is dismissed.

The reasons for the Board's decision are as follows.

3. The facts in this case were not in dispute and were not complicated, as disclosed by the Board's oral ruling reproduced above. The respondent gave the intervener notice to bargain prior to the expiry of the collective agreement by letter dated October 28, 1986. Approximately three and one half months after the collective agreement expired, the respondent made an application for conciliation services which resulted in the appointment of a conciliation officer on April 29, 1987. This termination application was filed with the Board approximately a week after the concili-

ation officer was appointed. The respondent's representative argued that the appointment of a conciliation officer in this factual setting created a bar to the termination application.

4. Section 57 is a provision of the Act which permits employees during certain periods of time to terminate their union's bargaining rights. Employees are not allowed to make applications under section 57 at any time they become disenchanted with their bargaining agent. As well as the time constraints contained within section 57, the section is made subject to section 61 of the Act. Sub-section 61(2), the relevant sub-section for our purposes, provides as follows:

(2) Where notice has been given under section 53 and the Minister has appointed a conciliation officer or a mediator, no application for certification of a bargaining agent of any of the employees in the bargaining units as defined in the collective agreement and no application for a declaration that the trade union that was a party to the collective agreement no longer represents the employees in the bargaining unit as defined in the agreement shall be made after the date when the agreement ceased to operate or the date when the Minister appointed a conciliation officer or a mediator, whichever is later, unless following the appointment of a conciliation officer or a mediator, if no collective agreement has been made,

- (a) at least twelve months have elapsed from the date of the appointment of the conciliation officer or a mediator; or
- (b) a conciliation board or a mediator has been appointed and thirty days have elapsed after the report of the conciliation board or the mediator has been released by the Minister to the parties; or
- (c) thirty days have elapsed after the Minister has informed the parties that he does not consider it desirable to appoint a conciliation board,

whichever is later.

5. Sections 57 and 61 are reflective of a statutory scheme which attempts to achieve stability in labour relations. Employees can change their bargaining agent or elect to terminate their union's bargaining rights only during certain periods of time as provided for in the Act. A system in which employees could affect changes to representation rights whenever they wanted would be extremely unstable and could seriously harm the collective bargaining interests of all concerned. On the facts of this case, the applicants could have applied between November 1, 1986 and April 29, 1987 to terminate the respondent's bargaining rights. In the circumstances of this case, the clear wording of sub-section 61(2) dictates that this application cannot be made after the Minister appointed a conciliation officer.

6. Counsel for the applicants recognized that the clear wording of sub-section 61(2) of the Act made the application before us untimely. However, counsel argued that, for essentially two reasons, the Board should not give effect to sub-section 61(2). Counsel argued that freedom of association, and the right to disassociate implied therein, is an extremely important right employees have. Since the appointment of a conciliation officer in these circumstances can affect this important employee right, the trade union is required to give employees notice of its conduct which causes such an appointment to occur. In this case, the union was obligated to advise employees that it gave notice to bargain and applied for the appointment of a conciliation officer. Counsel submitted that the principle of British common law that one must give notice to others concerning matters which may affect their rights, applies in the circumstances of this case. Counsel suggested that it was particularly appropriate to apply the principle in this case since sub-section 61(2) was in the nature of a technical provision. Counsel also argued that sub-section 61(2) should be given no force and effect since it restricts employees' rights to terminate a union's bargaining rights and in so doing is in conflict with the employees' freedom of association guaranteed by section 2(d) of the Charter. These arguments were not supported by any authority.

7. In considering counsel for the applicants' first submission, the Board was prepared to assume, without deciding, that the respondent did not advise the employees of its notice to bargain and of its application for the appointment of a conciliation officer. The Board is satisfied that there is no obligation on the trade union to advise the employees in the bargaining unit of its notice to bargain or of its application for the appointment of a conciliation officer. Even if such an obligation exists and was breached by the respondent, we cannot see how this assists the applicants. Sub-section 61(2), contrary to the position taken by counsel for the applicants, is a substantive, not a technical provision. The Board does not have a discretion when it comes to applying the clear terms of the section. The fact that the union may not have met its obligations, which we find is not the case, does not give the Board the authority to ignore the clear wording of sub-section 61(2). We note that counsel for the applicants recognized that the employer would not have any obligation to advise employees if it gave notice to bargain or applied for the appointment of a conciliation officer, even though such conduct on the employer's part also would lead to the imposition of a bar when a conciliation officer was appointed.

8. In considering counsel for the applicants' second submission, the Board was prepared to assume, without deciding, that a large majority of the employees in the bargaining unit had voluntarily indicated an intention to terminate the respondent's bargaining rights. During the course of counsel's second submission, and in response to an inquiry by the Board, counsel advised the Board that notice of this *Charter* argument had not been given to either the Attorney General of Canada or the Attorney General of Ontario. Counsel requested the Board to refer the *Charter* issue to a Court and indicated he would give notice of that proceeding to the appropriate Attorney(s) General. Counsel did not provide us with any indication as to the source of the Board's power to refer the *Charter* issue to a Court.

9. The Board previously has indicated that *Charter* matters should be placed before the Board in an appropriate way. In order to ensure a full and fair hearing, the Board has decided that *Charter* challenges ought not to be entertained in the absence of notice to the appropriate Attorney(s) General. See, *Dominion Paving Limited*, [1986] OLRB Rep. July 946. The fact that no such notice was given in this case is sufficient reason to reject the applicants' second argument. We are satisfied that the Board does not have the power to refer the *Charter* issue to a Court for determination. Under section 24(1) of the *Charter*, only persons whose charter rights or freedoms have been infringed or denied may apply to a Court of competent jurisdiction for a remedy. Even if the Board had the power to initiate such a reference, we are of the view that it would not be appropriate to do so in the circumstances of this case.

10. In passing, the Board notes that the *Charter* argument made by counsel for the applicants in this case was addressed in a previous decision of the Board. In *Egan Visual Inc.*, [1986] OLRB Rep. Aug. 1075, it was argued that section 40(a) and other sections of the Act which place restrictions on when employees can apply to terminate a union's bargaining rights conflict with the employee's freedom of association guaranteed by section 2(d) of the *Charter*. We concur with the Board's response to this argument which was as follows:

3. ... Further, in our view, the freedom of association protected by section 2(d) of the *Charter* does not mean that all restrictions on when employees can apply to terminate a union's bargaining rights, or have another union apply to become their bargaining agent, are invalid. Such restrictions are required to provide stability in labour relations and to allow the system of labour relations contemplated by the Labour Relations Act to function in an orderly manner. In that such restrictions form an essential part of an overall statutory scheme which serves to enhance and protect employees' freedom of association, they do not result in any real loss in the freedom to associate on the part of employees. In the alternative, if the time limits do in fact impinge on employees' freedom of association, then as part of a statutory scheme designed to bring order and stability to labour-management relations we are satisfied they are justified under section 1

of the Charter as limits prescribed by law that can be demonstrably justified in a free and democratic society. ...

0883-87-R; 1092-87-U The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 527, Applicant v. **D. E. Witmer Plumbing and Heating Limited**, Respondent v. Group of Employees, Objectors; Bill Hennink and Bill Bonvanie, Complainant v. The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of The United States and Canada, Local Union 527, Respondent

Bargaining Unit - Certification - Construction Industry - Representation Vote - Whether appropriate to include steamfitters in plumbers unit when separate certified trades and employer not employing any steamfitters - Standard unit including steamfitters granted - Irrelevant whether there are employees in all the classifications used to describe that standard unit - Board exercising its discretion to order a representation vote because of improper union conduct

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *D. A. MacDonald* and *H. Kobryn*.

APPEARANCES: *N. W. Meikle*, *Jack Porter* and *Tom Crystal* for the applicant/complainant; *Ian S. Campbell*, *Michael Mulroy* and *Douglas Witmer* for the respondents; *Terence J. Billo*, *Bill Hennink* and *Bill Bonvanie* for the objectors.

DECISION OF G. T. SURDYKOWSKI, VICE-CHAIR, AND BOARD MEMBER D. A. MACDONALD; September 29, 1987

1. Pursuant to the Board's direction dated July 24, 1987, these two matters came on for hearing together on September 4, 1987.

2. The Board finds that the applicant ("Local 527") is a trade union within the meaning of sections 1(1)(p) and 117(f) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under clause (a) of section 139(1) on May 14, 1982, the designated employee bargaining agency is the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada ("UW") and the Ontario Pipe Trades Council of the Plumbing and Pipe Fitting Industry of the United States and Canada ("the Pipe Trades Council").

3. Board File No. 0833-87-R is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or

- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection (3) or by voluntary recognition.

4. The bargaining unit of employees of the respondent for which Local 527 seeks to be certified herein is described, in the application, as:

Bargaining Unit No. 1

all plumbers, plumbers' apprentices, steamfitters, steamfitters' apprentices and pipe welders in the employ of the respondent engaged in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

Bargaining Unit No. 2

all plumbers, plumbers' apprentices, steamfitters, steamfitters' apprentices and pipe welders in the employ of the respondent in Board Geographic Area No. 6, excluding the industrial, commercial and institutional sector of the construction industry, save and except non-working foremen and persons above the rank of non-working foreman.

5. The respondent filed a reply, a list of employees containing twelve names on Schedule A, and specimen signatures for those employees within the time fixed therefore in accordance with the Act and the Board's Rules of Procedure.

6. In paragraph 8 of its reply, the respondent describes the unit of its employees that it claims to be appropriate for collective bargaining bargaining as:

Bargaining Unit No. 1

all plumbers and plumbers' apprentices employed by the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foremen.

Bargaining Unit No. 2

all plumbers and plumbers' apprentices employed by the respondent in Board Geographic Area No. 6, excluding the industrial, commercial and institutional sector of the construction industry, save and except non-working foremen and persons above the rank of non-working foreman.

At paragraph 14(3) of its reply, the respondent requested that the Board schedule a hearing of the application for the following reasons:

A hearing is necessary to determine the appropriate bargaining unit. The applicant has proposed bargaining units which would include steamfitters, steamfitter's apprentices and pipe

welders. The bargaining units proposed by the respondent do not include steamfitters, steamfitter's apprentices and pipe welders.

The facts relied upon by the respondent with respect to this issue are as follows:

- i) The respondent has never employed steamfitters, steamfitter's apprentices and pipe welders; and,
- ii) The respondent does not foresee ever employing persons within the certified trade of steamfitter or persons within the trade of pipe welders.

The respondent submits that on the basis of the above facts, the appropriate bargaining units are as described in paragraph 8 of this reply.

In support of this submission, the respondent relied upon Regulations 52 and 59 R.R.O. 1980 under the Apprenticeship and Tradesmen's Qualification Act which designate the trades of a plumber and steamfitter as distinct and separate certified trades.

Consistent with these assertions, all of the persons on the list of employees filed by the respondent are described as being either plumbers or plumbers' apprentices.

7. At the hearing, counsel for the respondent argued that "plumbing" and "steamfitting" are separate trades and that in order for both to be included in a bargaining unit description, at least one person "representing" each must be employed by a respondent on the date the application is made. Counsel submitted that such a requirement flows from section 3 of the Act which provides that every person is free to join a trade union of his/her own choice.

8. Clause (a) of section 139 of the Act provides that:

139.-(1) The Minister may, upon such terms and conditions as the Minister considers appropriate,

- (a) designate employee bargaining agencies to represent in bargaining provincial units of affiliated bargaining agents, and describe those provincial units;

Designation orders issued pursuant to that provision describe the provincial units of employees contemplated by the province-wide collective bargaining scheme established by the Act for the industrial, commercial and institutional ("ICI") sector of the construction industry and designate, for each such unit, an employee bargaining agency. Further, they designate the trades or crafts that, in effect, belong to each employee bargaining agency or affiliated bargaining agent. Employee bargaining agencies and their affiliated bargaining agents can only represent, in the province-wide ICI collective bargaining scheme, those employees who are in a trade they have been designated to represent *Ninco Construction Ltd.*, [1982] OLRB Rep. Nov. 1692; *Manacon Construction*, [1983] OLRB Rep. March 407; *Superior Plumbing and Heating Ltd.*, [1986] OLRB Rep. Nov. 1589). Consequently, the Board cannot describe a bargaining unit of employees, under section 144(1) of the Act, in a manner which includes trades or crafts not encompassed by the relevant designation order. Nor can the Board describe a bargaining unit in a manner which excludes employees, and concomitantly their trades, who would be bound by a provincial collective agreement.

9. The UA and Pipe Trades Council are the employee bargaining agency designated by the Minister, pursuant to clause (a) of section 139(1) of the Act, to represent in collective bargaining all journeymen and apprentice plumbers and "pipe fitters" represented by the affiliated bargaining agents listed in the designation, of which the applicant herein is one. The Board's standard

description of bargaining units represented by this employee bargaining agency and its affiliated bargaining agents uses the terms “plumbers”, “plumbers’ apprentices”, “steamfitter”, and “steamfitters apprentices”. When requested, the Board also uses a clarity note to specify that welders working in the “plumbing” and “steamfitting” trades are employees in the bargaining unit. The term “pipefitter” is not one used by the Board in describing bargaining units. For purposes of the *Labour Relations Act*, the terms “steamfitters”, and “pipefitters” are synonymous. In our view, the fact that “plumber” and “steamfitter” are separately certified trades under the *Apprenticeship and Tradesmen Qualifications Act* is not material to the Board’s considerations concerning the appropriate bargaining unit description. For purposes of proceedings before the Board, “plumber” and “steamfitter” are no more than different classifications, if they are that, of the same trade or craft. Indeed, it is commonly referred to as “plumbing and steamfitting trade”. Except for the manner in which it has included welders, the bargaining unit for which Local 527 seeks to be certified in this proceeding is the “standard” unit granted to the UA and the Pipe Trades Council, or its affiliated bargaining agents. The Board’s well established practice, in applications where a construction industry trade union seeks certification for its standard trade or craft unit, is to grant the unit sought, whether or not there are present, or contemplated, employees in all the classifications used to describe that standard unit. The right of an individual to join or not join a trade union of his/her own choice, which is not an absolute one in any event, is not material to the Board’s considerations concerning the appropriate bargaining unit description, except perhaps in the limited circumstances contemplated by sections 6(4) and 6(5) of the Act.

10. Accordingly, pursuant to section 144(1) of the Act, the Board finds that all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all plumbers, plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent in all other sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), save and except non-working foremen and persons above the rank of non-working foremen, constitute a unit of employees of the respondent appropriate for collective bargaining. For the purposes of clarity, the Board declares that welders working at the plumbing and steamfitting trades are employees included in the bargaining unit.

11. In support of its application for certification, the applicant filed documentary evidence in the form of cards, which consist of combination applications for membership and attached receipts. The trade union filed twelve such cards, eleven of which bear the name of an employee in the bargaining unit. These cards each contain the original signature of an employee, and the receipts, which are countersigned by a witness (the collector), indicate that a payment of \$1.00 has been made to the union with respect to membership fees within the six-month period immediately preceding the terminal date in this application. The cards and money were collected by more than one person and the membership evidence is supported by a duly completed Form 80, Declaration Concerning Membership Documents, Construction Industry which attests to the regularity and sufficiency thereof. In short, the form and content of the membership evidence are consistent with the requirements of the Act.

12. The Board is satisfied, on the basis of all the evidence before it, that more than fifty-five percent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on July 8, 1987, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the Act. Standing alone, the applicant’s membership evidence is sufficient to entitle it to be certified without the taking of a representation vote.

13. Also filed with the Board, however, is a statement of desire opposing the certification of the applicant. This contains the names and original signatures of three individuals. All three names appear on the list of employees in the bargaining unit filed by the respondent and two of the individuals who signed the statement of desire had previously signed a membership card which has been filed by the trade union in support of its application. By itself, the statement of desire is not relevant to the Board's considerations because even if proved voluntary, it would not cast sufficient doubt on the continued support for certification of the applicant, by a sufficient number of employees who also signed membership cards, to cause the Board to exercise its discretion under section 7(2) of the Act to direct that a representation vote be taken notwithstanding the level of support indicated by the membership evidence filed by the trade union (see *Unlimited Textures Company Limited*, [1984] OLRB Rep. Jan. 138; *Custom Foam Specialities Limited*, [1986] OLRB Rep. Dec. 1680).

14. The Board must also consider, however, Board File No. 1092-87-U which is a complaint under section 89 of the Act filed by two individuals who are employees in the bargaining unit during the material times. The complaint alleges that the complainants have been dealt with by Local 527 in a manner contrary to section 70 of the Act and requests, among other things, that the Board direct the taking of a representation vote in the application for certification.

15. There were a number of discrepancies between the evidence of the complainants and the evidence of Local 527's witnesses. Our assessment of the witnesses and their evidence leads us to make the following findings of fact.

16. Bill Hennink is an employee in the bargaining unit. Upon learning of Local 527's application for certification, he decided to oppose it. In that regard, he sought advice, first from an older brother and then from Mr. Billo, who acted as his counsel throughout. His first appointment with counsel was on Monday, July 6, 1987. That was just two days before the terminal date fixed for the application. Consequently, he attempted to make contact with some of his fellow employees prior to his meeting with counsel, even though the aforementioned statement of desire had not yet been prepared. He telephoned three or four employees on Saturday, July 4, 1987, but was able to make direct contact with only Bill Bonvanie, his co-complainant in the section 89 complaint and with whom he had already discussed the matter briefly. Mr. Bonvanie indicated he would join Mr. Hennink in opposing Local 527's application.

17. Brad Loucks, is and was at all material times, an employee of the respondent. There is no suggestion that he played any significant role in Local 527's organizing campaign, but he was a strong supporter of the application. He was excited by the situation in which he found himself. At approximately 8:00 p.m. on Saturday, July 4, 1987, Mr. Loucks learned that Mr. Hennink was trying to contact other employees to solicit their support for a statement of desire in opposition to Local 527's application. He became angry and he was concerned enough about the effect Mr. Hennink might have on the application to telephone him at home at between 11:00 and 11:20 p.m. His expressed intention in doing so was to dissuade Mr. Hennink from circulating any statement of desire in opposition to Local 527's application. A lengthy discussion, which became heated at times, ensued. In the course of that discussion, Mr. Loucks told Mr. Hennink that he should not be trying to persuade other employees to "oppose the union" and that he should "leave it alone". He told Mr. Hennink that "we" can make up "our" own minds. Although he was given the opportunity to do so, Mr. Loucks did not specifically deny that he wanted to give Mr. Hennink the impression that something would happen to him if he persisted with his statement of desire. Subsequently, Mr. Loucks made a number of further telephone calls to Mr. Hennink's home. The precise number of such telephone calls is not particularly important, but we find it likely that Mr. Hennink's estimate that there were 20 such calls is closer to the mark than Mr. Loucks' recollection of 5

or 6. On each occasion, Mr. Loucks let the telephone ring until Mr. Hennink answered and then immediately hung up without saying a word. He admitted that the purpose of these telephone calls was to harass Mr. Hennink and to emphasize Mr. Loucks' earlier message; that is, that he should not continue with his statement of desire.

18. Mr. Loucks achieved part of the effect he desired. Mr. Hennink, who was on vacation that week, met with counsel on July 6, 1987 as scheduled. Counsel drafted the aforementioned statement of desire for him and, later that day, he met with Mr. Bonvanie at his (Mr. Hennink's) home. They discussed the situation, including the telephone call from Mr. Loucks, and they decided that Mr. Bonvanie, not Mr. Hennink, would take the statement of desire and try to obtain employees signatures on it. For some reason, Mr. Bonvanie did not take the statement of desire with him that night. Instead, he and Mr. Hennink met again early the next morning at which time he took possession of it.

19. The applicant had called a meeting of bargaining unit employees of the respondent on July 6, 1987 as well. Mr. Hennink was not invited. Mr. Bonvanie was invited but did not attend. Tom Crystal, Local 527's business agent, testified that the meeting was called because a number of employees had called him and expressed concern and confusion about Mr. Hennink's statement of desire. We are satisfied that the involvement of Mr. Hennink and Mr. Bonvanie with the statement of desire, and Mr. Loucks July 4, 1987 telephone call to Mr. Hennink, were the subject of some discussion at that meeting, at least among the employees. Mr. Bonvanie had previously driven many of those employees to the meeting at which the majority of the cards filed in support of this application were signed and had himself been among the first to sign a card. Mr. Bonvanie's subsequent change of heart angered or confused some of these other employees. Although no official of Local 527 advised anyone to take any steps to try to stop the petition, neither did they advise them that Mr. Hennink and Mr. Bonvanie had a right to circulate a statement of desire if they chose to or that they should not be threatened or interfered with in that respect, even though the mood of some of the employees ought to have been evident.

20. The meeting called by Local 527 did little, if anything to calm the situation. That is evidenced by the cold reception Bill Bonvanie received from some employees when he reported for work at the respondent's shop the next morning. Later that same day, Mr. Bonvanie was working with Nigel Cave, a fellow employee and a supporter of Local 527's application. Mr. Cave conveyed to him what he called a "friendly" warning. Mr. Cave told Mr. Bonvanie that there was "heat" in the shop and that someone might "get him" sometime. He indicated to Mr. Bonvanie that his family would not be harmed nor his property damaged, but that he could get hurt. Frightened, Mr. Bonvanie almost immediately left the job site and went to Mr. Hennink's home. A few weeks later Mr. Bonvanie left the company. Although he had been contemplating doing so anyway, the events of July 7, 1987, clearly precipitated his departure.

21. As a result of the threats, Mr. Hennink and Mr. Bonvanie decided they would not risk trying to circulate the statement of desire further and they did not attempt to do so.

22. The object in certification proceedings is to determine whether a majority of the employees found by the Board to be appropriate for collective bargaining wish to be represented by the applicant trade union in their employment dealings with their employer. The *Labour Relations Act* provides that the certification of trade unions in this province is based primarily upon an assessment of the trade union's membership support as evidenced by membership records filed in support of an application. The Board does not inquire into opinions about the virtues of union membership except as evidenced by that documentary evidence and any timely statements of desire filed with respect to an application. In Ontario, as in most Canadian jurisdictions, the repre-

sentation vote exists as a residual mechanism for ascertaining the wishes of bargaining unit employees in cases where either the applicant union does have the support of more than fifty-five percent of the bargaining unit employees which is necessary for outright certification under section 7(2) of the Act (but does have the support of not less than forty-five percent of them), or where the circumstances are such that the Board sees fit to require such a vote to be held notwithstanding that there is documentary evidence showing membership in excess of fifty-five percent. The Board's discretion in that respect must be exercised in a manner that is consistent with the legislated primacy of the membership evidence as the means by which employee wishes with respect to certification are ascertained.

23. The realities of labour relations are such that employees can and do change their views as to the desirability of trade union representation. In recognition of this, the Board has developed a procedure which recognizes the validity of union membership cards or retains a flexibility to seek the conformity evidence of a representation vote where employee file a timely statement of desire which indicates a change of heart. Similarly, evidence of improper conduct may cast sufficient doubt on the reliability of the documentary evidence filed in support of an application for certification as an indicator of employee support for the applicant to cause the Board to resort to the further evidence of a representation vote (see *Alderbrook Industries Limited*, [1981] OLRB Rep. Oct. 1331; *St. Michael's Shops of Canada Limited*, [1979] OLRB Rep. Apr. 346; *The Kendall Company (Canada) Limited*, [1975] OLRB Rep. Aug. 611). In cases where improper conduct is established, the Board must assess the effect of that conduct. In doing so, the Board will not act as a censor of social pressures exerted for or against certification. As the Board noted in *Alberbrook Industries Limited*, *supra*:

13. Unfortunate as it may be, it is not uncommon for antagonism to be generated between employees who line up on opposite sides of a campaign for union representation. Statements by any person amounting to intimidation or coercion of an employee, whether they are made for or against a union, are clearly contrary to section 70 of the *Labour Relations Act* and are grounds for a complaint under section 89 of the Act. They may also form the basis for criminal charges. It does not follow, however, that the indiscretions of employees, whether they favour a union or sympathize with their employer, are to be held against the principal parties to an application for certification. The Board can no more hold against a union a verbal threat made to an employee's job security by an indiscrete employee who is neither a union officer nor a collector of union membership cards than it can hold against an employer similar threats made by a fervently anti-union employee acting on his own. Evidence of widespread threats which are made by neither the employer nor the union might, of course, cause the Board to resort to the further evidence of a representation vote.

24. In this case, there is no doubt that the actions of Loucks and Cave exceeded the bounds of acceptable social pressure and amounted to intimidation and coercion which, as a result, stopped the circulation of the statement of desire originated by Mr. Hennink and effectively deprived employees of the opportunity to express their wishes through it. Further, the applicant was fully aware of at least the general situation, if not the details, of the improper conduct, yet it did nothing to try to deal with what should have been an obvious problem, even though it called a meeting of employees for the purported purpose of doing so. The manner in which the applicant dealt with the issue of the statement of desire at the meeting did nothing to dissipate, and may have increased, the "heat" surrounding it.

25. In the result, we are not satisfied that the documentary evidence of membership filed by the applicant is a sufficiently reliable indicator of the wishes of the employees in the bargaining unit to entitle the applicant to be certified without the taking of a representation vote. Accordingly, pursuant to the Board's discretion under section 7(2) of the *Labour Relations Act* we direct that a representation vote be taken of the employees of the respondent in the bargaining unit as found

by the Board. All employees of the respondent in the bargaining unit on the date hereof, who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

26. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

27. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER H. KOBRYN;

1. Let us look at the real facts in this case and the situation as it developed, and the sequence of dates relevant to this case.

2. It was a Wednesday night in June, Mr. Bonvanie took six or seven employees in his van to a union meeting. There were ten employees at the meeting and everyone signed union cards.

3. The union made an application for certification on Friday June 26, 1987 with a terminal date of Wednesday July 8, 1987.

4. Certification documents were posted on Thursday July 2, 1987. Mr. Hennink saw some at 5:30 p.m., contacted his brother, who is a carpentry contractor for a lawyer referral service in Toronto. He got a lawyer's name, and contacted the lawyer. This all happened the same evening, Thursday July 2, 1987. Until this date he had no prior knowledge of the union organizing drive and no one approached him to sign a card. Saturday, July 4, 1987 he started to telephone the employees of the company asking them to sign the petition in opposition to the union. The only employee reached directly was Bill Bonvanie. Saturday July 4, he had a phone call from Loucks, a lengthy conversation about the union and the petition, which got heated at times. That is when the alleged threats were made. These alleged threats did not prevent Mr. Hennink with continuing with the petition. On Monday July 6, 1987 he met with his lawyers at 9:00 a.m. where the petition was drafted and also the covering letter to the Board. The week beginning Monday July 6, Hennink was on vacation. He called Mr. Bill Bonvanie after work to come to his house and sign the petition. The following morning Bonvanie met Hennink at a coffee shop, he picked up the petition because he knew one more person who would sign it, and took the petition at 8:45 a.m.

5. Mr. Bonvanie had been a member of the union before, for four years from 1980 to 1984. He found out that Hennink was circulating a petition when Hennink called him and they discussed it for the first time, which was Thursday, the same evening Hennink picks up his paycheque. After he spoke to Hennink, he did nothing until he met him on Saturday morning and agreed to help him. Monday evening when he went to sign the petition, Hennink told him he made it up and he could sign it. When they talked about it Bonvanie found out Hennink was threatened so he decided to take over the petition. The following morning he met Hennink at a restaurant at 7:45 a.m. and proceeded to talk to the employee on the job site where he was working at 8:45 a.m., he is petitioner #3. Bonvanie told him Hennink and himself were circulating the petition and that management does not know about it. He talked to three others at job sites as well, and they did not want to sign.

6. Some of the questions in chief to Bonvanie were:

What about the Monday night union meeting?

I was told of the meeting on July 6, 1987.

Why did you not go?

I chose not to support the union and saw no need to be there.

Did you feel endangered at work?

Yes, the next morning (Tuesday July 7, 1987) at the shop as I walked in, everybody looked at me funny (Caves told me later that if Doug (Witmer) had not been in they would have got me.

How many do you believe signed up with the union?

Ten at the meeting and one later.

What period of time did it take you to change your mind from that Wednesday in June?

Two weeks.

During that period of two weeks did you discuss things about the union certification with the employees?

Yes, we discussed things about the union with them.

Other than the three people mentioned did you speak to any other employees of Witmer?

No.

7. Some of the questions in chief to Caves were:

Where were you working on Tuesday July 7, 1987?

Kortes Steel.

What time did you arrive there?

7:20 a.m.

Did you go to the shop first?

Yes.

Anyone else with you at Kortes Steel?

Yes, Fred Wright.

Anyone else come to Kortes?

Yes, Bonvanie.

When did he arrive?

About 10:30 a.m.

How do you recall that time?

I just finished my coffee break.

Did Bonvanie say why he was there?

He said he came out to help me and when Fred Wright went to call Ron Hathaway to come to the site he said we were making a big mistake to put Witmer in the union, and that he had a petition and wanted me to sign it. He wanted me to change my mind as John Palister and Fred Wright did.

How long did the conversation last?

Maybe 30 minutes.

Did either of you get angry at any point in the conversation?

No.

Did he stay and help you?

No, he said I made up his mind and he was going to quit the company.

8. How can one argue as in this case that the various conversations between employees, granted one was a heated conversation, which is referred to as threats that kept the two petitioners from signing more employees. Monday evening July 6, 1987 when Mr. Bonvanie arrived at Mr. Hennink's home to sign the petition, he told Hennink he would take the petition because he knew one more person who wanted to sign the petition. The next day, he met Hennink in the coffee shop, whether it was at 8:45 a.m., as Hennink said, or 7:45 as Bonvanie said. Anyway, when he arrived at the shop to start loading his truck before going out to the job site, all the employees stopped and looked funny at him. Later when he spoke to three other employees other than petitioner #3, who was on the same job site as Mr. Nigel Caves, they refused to sign the petition. This was Tuesday July 7, 1987. Also, he told his counsel that he felt endangered at work when on Tuesday morning he came into the shop and everyone looked funny at him. I am not convinced that the alleged threats stopped the petitioners from getting more names, even where he is trying to sign these employees on the various job sites, on company time, and seemed to be doing it without any apparent fear from management for doing this, instead of his regular duties.

9. It is understandable that fellow employees, especially the apprentices, were somewhat disappointed and angry with Mr. Bill Bonvanie when they were looking to him as a former member of this local union, and the fact that he used his van to transport six or seven of them over to the union hall, the night they all signed union membership cards. Then finding out that Mr. Bonvanie has switched sides and deserted them at this crucial time.

10. What is significant to me, from Hennink's evidence in chief, is he did not find out about the union's organizing campaign until Thursday July 2, 1987 at 5:30 p.m. when he comes into the shop to get his pay, he sees the notice posted that the union applied for certification of his employer. During the whole period from the time the employees decided to go and join the union and to the posting of the Ontario Labour Relations Board green sheets, no one talked to Mr. Hennink about this, not even Mr. Bonvanie his co-author. It must be assumed that all the other employees considered Mr. Hennink as being anti-union or too close to management to be trusted to keep their secret from the powers that be, because there is no other reasonable explanation for this lack of communication with Mr. Hennink. How is this person that no one trusts going to convince these employees that his anti-union stand is the correct one? So he has to recruit someone else to take

the petition around because he is on holidays. So who does he recruit but Mr. Bill Bonvanie, who through his own evidence has a chip on his shoulder about the union, and he too gets the cold shoulder from the vast majority of the employees.

11. Even if you could characterize the various conversations as threats to the petitioners, the petitioners did not have the support of the other employees. Case in point, no one would speak to him about the union or the organizing drive, not even Bonvanie, who only spoke to him about same after the notice was posted. As for Bonvanie, he also lost the confidence of his fellow employees, in his own words that they all looked funny at him on the morning after the union meeting, when the only one not present at the meeting of the group that signed with the union was Bonvanie.

12. The true wishes of the employees are set out in two documents, the membership evidence and the petition, which has only two names that overlap, still leaving the union with a healthy majority of 9 union membership cards out of a total of 12 employees. Further, none of the people involved in these conversations with the petitioners were the union organizers.

13. For all the above reasons I disagree with the majority in ordering a vote in this case. I would have certified the union outright.

3417-86-R Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. **Darrow Developments Ltd.**, Respondent

Certification - Construction Industry - Whether persons employed as construction labourers on the application date - Three of four persons in dispute found not to be employed as a construction labourer on the application date - Certificates issuing

BEFORE: *Harry Freedman*, Vice-Chair, and Board Members *J. A. Ronson* and *P. Grasso*.

APPEARANCES: *Larry Steinberg* and *V. Claro* for the applicant; *Lynn H. Harnden*, *Paul M. Beaudry* and *Mike J. Moquin* for the respondent.

DECISION OF THE BOARD; October 15, 1987

1. By decision dated April 7, 1987, the Board, differently constituted, authorized a Labour Relations Officer to inquire into the list of employees in the bargaining unit and report back to the Board. The Officer's report was filed and the Board convened a hearing to deal with the representations of the parties with respect to the Officer's report.

2. At the hearing of this matter, the respondent abandoned the objection it had made during the Officer's inquiry, as more particularly set out in counsel's letter of June 25, 1987. Counsel for the respondent also agreed with the applicant's position that Steve Bourassa was not an employee in the bargaining unit on the date the application was made.

3. The parties remained in dispute with respect to four persons whom the respondent had listed as being in the bargaining unit. The applicant asserts that those four persons were not employed as construction labourers on the application date while the respondent takes the con-

trary view. There was however no dispute between the parties over the criteria that the Board should use in determining whether the four persons were employed as construction labourers on the date the application was made. The Board in *E & E Seegmiller Limited*, [1987] OLRB Rep. Jan. 41 and *Gilvesy Enterprises Incorporated*, [1987] OLRB Rep. Feb. 220 indicated that where there was a dispute over whether a person was an employee in the bargaining unit for which an applicant seeks certification pursuant to the construction industry provisions of the Act, the Board is concerned principally with whether that person was employed by the respondent and at work on the application date and whether that person spent a majority of his or her time on the application date performing work that is done by employees in the bargaining unit. If the evidence about the work the disputed employee did on the application date is inconclusive, the Board may consider other relevant factors, including the primary reason for the hiring of that employee.

4. The respondent is engaged in both construction and property management activities. The respondent's three primary functions, as described by Colin Darrow, the president and principal shareholder of the respondent are building its product, selling its product and financing the construction and sales of its product. The respondent is engaged in both construction and property management activities. It generally manages the property and buildings that it has constructed. While counsel for the applicant suggested that the respondent has separate construction and property management divisions, counsel for the respondent submitted that its operations are somewhat integrated and that some employees may perform work on any given day in connection with both the construction and property management activities of the respondent. It appears that the disagreement between the parties over two of the four persons in dispute stems in part from their performance of different kinds of work in connection with both the construction and property management activities of the respondent.

5. The four persons remaining in dispute were Edward Derochie, Gary Gagnon, Norm Hazelwood and Bryon Maynard.

Edward Derochie

6. Mr. Derochie was at work on the application date. He viewed himself and was viewed by the other witnesses as a janitor. The applicant submits that on the application date, Mr. Derochie worked primarily as a janitor while the respondent submits that Mr. Derochie spent a majority of his time on the application date doing the work of a construction labourer.

7. Mr. Derochie was not certain what work he actually did on March 17, 1987, although he thought that he spent most of his time cleaning the Rideau Business Center, a completed building managed by the respondent. There was some evidence that Mr. Derochie worked part of that day in the parking lots of the Rideau Trade Center, a construction project nearing completion being built by the respondent, cleaning up debris left over from construction. Some of the respondent's evidence suggested that Mr. Derochie spent the majority of his time on that day cleaning up construction debris.

8. We cannot, with certainty, determine the amount of time that Mr. Derochie spent doing the clean up of construction debris on March 17. The respondent submitted that that day was unusual, whereas Mr. Derochie thought that March 17 was no different than his other work days. In our opinion, it is more probable that Mr. Derochie was working a majority of his time on March 17, 1987 cleaning the offices, washrooms and common areas of the Rideau Business Center and the Rideau Trade Center. Part of the Rideau Trade Center was already occupied. While Mr. Derochie may have also done some clean up of construction debris in the parking lot, and in the interior of the part of the Rideau Trade Center still under construction, we find that that clean up of construc-

tion debris did not occupy a majority of his work time on that day. We therefore find that Mr. Derochie was not employed as a construction labourer on March 17, 1987.

Gary Gagnon

9. Gary Gagnon was classified as a property manager who performed various functions in connection with both the respondent's property management and construction activities. Mr. Gagnon was also uncertain as to what work he did on March 17, 1987. Mr. Gagnon explained that he did minor repairs and corrections of construction deficiencies. He also drives between sites owned by the respondent to pick up and drop off materials. He has a desk where he spends some time on the telephone and completes bank deposits for the rent that he has collected from the respondent's tenants. The respondent's executive vice-president, Gabriel Louli suggested that Mr. Gagnon had the use of a desk because it would, in effect, make Mr. Gagnon believe he had a more responsible job than the respondent expected him to perform and that Mr. Gagnon used that desk very infrequently. However, we note that Steve Sculland, a construction supervisor employed by the respondent and who was called as a witness by the respondent during the Officer's inquiry stated in response to a question from the respondent's representative at that inquiry, who was not counsel before us, that he occasionally saw Mr. Gagnon when he, Mr. Sculland, was in the office during paperwork.

10. Mr. Louli stated that Mr. Gagnon was removing concrete blocks from a wall opening in the Rideau Trade Center on March 17, 1987. While that kind of work might be done by Mr. Gagnon as the need arose, it was not typical of the work he performed. The recollection of Mr. Louli was corroborated by Mike Moquin, the operations manager of the respondent, Mr. Louli's statements were not supported by either Mr. Gagnon nor did Russell Grass, a construction manager of the respondent corroborate Mr. Louli's recollection. Mr. Grass recollected that he saw Mr. Gagnon sweeping the parking lot of the Rideau Trade Center with Mr. Derochie on March 17, 1987.

11. Mr. Darrow suggested that Mr. Gagnon was hired and worked principally as a labourer. We note here that Mr. Darrow stated in response to a question from the respondent's representative at the Officer's inquiry that Mr. Darrow did the hiring and firing of all employees except for labourers, and then stated that he hired Mr. Gagnon to be a labourer.

12. As with Mr. Derochie, the evidence of what work Mr. Gagnon performed on the date of application does not lead to a firm conclusion. Mr. Gagnon was paid a salary, was referred to as a property manager, and performed numerous duties for the respondent.

13. Both Mr. Louli and Mr. Darrow stated that Mr. Gagnon had lied when responding to questions about his duties, yet the respondent's representative at the Officer inquiry did not confront Mr. Gagnon in cross-examination with those allegations and did not suggest to Mr. Gagnon in cross-examination that he was performing the work that Mr. Louli and Mr. Moquin said he was doing on March 17. Mr. Gagnon, as an employee who was in dispute, was called as a witness by the Officer and therefore was cross-examined by both the applicant and respondent. The respondent's representative at the Officer inquiry did not even seek to have Mr. Gagnon recalled as a witness in order to deal with the claims by Mr. Louli and Mr. Moquin that Mr. Gagnon had told them that he had lied to the Labour Relations Officer. In these circumstances, we place no weight whatever on the statements of Mr. Louli and Mr. Darrow that Mr. Gagnon had told them after he testified that he had lied to the Labour Relations Officer about the work he did.

14. The evidence does not conclusively establish the type of work that Mr. Gagnon did on the date of application, and therefore, we consider other relevant criteria, such as his job title, purpose for hire and the kind of work that he normally performed around the time the application was

made. Based on that evidence, we have no doubt that although Mr. Gagnon may on occasion have performed work normally done by construction labourers, Mr. Gagnon was not employed as a construction labourer on March 17, 1987.

Bryon Maynard

15. Bryon Maynard was employed principally as a construction superintendent for the respondent and was responsible for supervising three of the respondent's construction projects. Mr. Maynard was paid a salary. He supervised the work of the respondent's labourers and the work done by the sub-contractors of the respondent on the various job sites he supervised. On the day of application, Mr. Maynard installed a bellboard, which is simply a piece of plywood nailed to a wall to which telephone equipment is attached and also hung a door. Mr. Maynard used the phone for most of the day, dealing with suppliers, sub-contractors, and other people employed by the respondent so as to ensure that the jobs over which he had authority were running properly.

16. Mr. Louli explained that Mr. Maynard is responsible for construction supervision as well as performing manual labour. Mr. Louli indicated that Mr. Maynard, although a construction superintendent, was always quite willing to do the manual work that needed to be done on any job. Mr. Maynard reported to Mr. Grass, a construction manager of the respondent.

17. We are satisfied that on March 17, 1987, Mr. Maynard did some work that may be done by a construction labourer. However, the evidence clearly indicates that Mr. Maynard spent a majority of his time on that day doing work other than that of a construction labourer, that is, he was supervising and co-ordinating the work being done on the respondent's construction projects over which he had authority. Therefore, we are satisfied that Mr. Maynard was not employed as a construction labourer on the date the application was made.

Norm Hazelwood

18. Norm Hazelwood worked at the respondent's construction project in Brockville. On the day of application, the applicant's witnesses indicated that Mr. Hazelwood spent most of his day operating a transit and using a level. Mr. Hazelwood indicated that he generally worked with the other two labourers on the project and occasionally gave them direction.

19. Mr. Hazelwood often assisted John Renwick, the respondent's construction superintendent on that job in the lay out of the job, by checking the excavation work and shooting the lines for the excavating sub-contractor by using a transit and level. Mr. Hazelwood was quite certain that he performed labourer's work, such as placing plastic and straw around freshly poured concrete or using a shovel to fill in a hole with crushed stone at the time the application was made.

20. Ken Fader, a union steward who was at the respondent's construction project in Brockville as an employee of the forming sub-contractor, stated that he saw Mr. Hazelwood using the transit and level, but did not see him doing any other physical work on that day. Mr. Fader had been told by Victor Claro, a full-time representative of the applicant to pay special attention to work being done on March 17 because the application was being made on that day. Mr. Fader said that a pour of concrete was done on that day and that the concrete was covered by labourers employed by the respondent. Mr. Fader also said that he saw Mr. Hazelwood working the transit for about an hour in the morning of March 17, and that he spent the balance of his time that morning going back and forth between the other labourers and the excavator. Mr. Fader said that Mr. Hazelwood was calculating the amount of concrete needed for the pour in the afternoon.

21. Mr. Hazelwood was not as specific about the work he did on March 17, 1987 as Mr.

Fader was, but he agreed that he did use the transit and shot lines for the excavator that day. The evidence of the other witnesses and Mr. Hazelwood all indicate that he did labourer's work associated with the excavation and the pouring of concrete. In our opinion, it is probable on March 17 that much of the work Mr. Hazelwood did, other than using the transit, was work normally done by construction labourers.

22. Mr. Fader said that concrete was poured about 1:00 p.m. on March 17. He did not see Mr. Hazelwood very much after that. Therefore, the calculation that was done by Mr. Hazelwood would have been completed before 1 o'clock on that day. Mr. Hazelwood only used the transit for about one hour that morning. We find that Mr. Hazelwood spent a majority of his time on that day performing the work of a construction labourer. Therefore, we conclude that Mr. Hazelwood was employed as a construction labourer on the application date.

Conclusion

23. Having regard to the Board's decision of April 7, 1987, and based on the material filed and our conclusions with respect to the persons in dispute, we find that there were nine employees in the bargaining unit on the date the application was made.

24. The applicant filed five combination applications for membership and receipts. The applicant also filed a duly completed Form 80, Declaration Concerning Membership Documents, Construction Industry.

25. The Board finds that Locals 183, 247, 491, 493, 506, 527, 597, 607, 625, 837, 1036, 1059 and 1081 of the Labourers' International Union of North America, Ontario Provincial District Council are trade unions within the meaning of section 1(1)(p) of the *Labour Relations Act*. The Board further finds that they are constituent trade unions of the applicant.

26. The Board further finds that the applicant is a council of trade unions within the meaning of section 1(1)(g) of the *Labour Relations Act*.

27. The Board is satisfied that the constituent trade unions of the applicant have vested appropriate authority in the applicant to enable it to discharge the responsibilities of a bargaining agent within the meaning of section 10(1) of the *Labour Relations Act*.

28. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on September 30, 1983, the designated employee bargaining agency is the Labourers' International Union of North America, and the Labourers' International Union of North America, Ontario Provincial District Council.

29. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of one or other of the constituent trade unions of the applicant and therefore, pursuant to section 10(3) of the *Labour Relations Act*, are deemed to be members of the applicant on March 31, 1987, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

30. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

..., the Board shall certify the trade unions as the bargaining agent of the employees in *the bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

[emphasis added]

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 28 above in respect of all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

31. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all construction labourers in the employ of the respondent in all other sectors of the construction industry, except the industrial, commercial and institutional sector, in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, and in the geographic Townships of Elizabethtown, Augusta and Edwardsburg and all lands south thereof in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foreman.

0564-87-R; 0693-87-U; 0820-87-U; 0821-87-U National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Applicant v. **Dresser Canada, Inc.**, Respondent v. Group of Employees, Objectors; National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Complainant v. Dresser Canada Inc., Respondent; National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Complainant v. Dresser Canada Inc., Respondent v. United Steelworkers of America, Intervener; National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Complainant v. Dresser Canada Inc., Respondent v. United Steelworkers of America, Intervener

Certification - Practice and Procedure - Reconsideration - Unfair Labour Practice - Reconsideration of Board decision not to consolidate representation and unfair labour practice complaints - Purpose and effect of consolidation reviewed - Order that matters be heard together but not consolidated

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *R. M. Sloan* and *B. L. Armstrong*.

APPEARANCES: *L. N. Gottheil*, *Wayne Mackay*, *Sheila Sager*, *Janet Oliphant*, *Murray MacDonald* and *Andy Moran* for the applicant/complainant; *Thomas A. Stefanik*, *James P. Adams*, *Bernie Jones*, *Gary Aubry* and *John Mellors* for the respondent; *Leslie Doherty* for the objectors; *Brian Shell* and *Jim Pudge* for the intervener.

DECISION OF THE BOARD; October 8, 1987

1. These matters came on for hearing together in Toronto on July 15, 1987. The first issue before the Board was whether or not the four proceedings should be consolidated as the applicant requested. The respondent took no position on that issue. Both interveners opposed consolidation. After hearing the representations of the parties, the Board adjourned to consider the applicant's request and, upon returning, ruled orally, with brief reasons, that Board File Nos. 0564-87-R and 0693-87-U would be consolidated and proceed that same day and, further, that Board File No. 0820-87-U and 0821-87-U would be consolidated and be adjourned *sine die* to a date to be set by the Registrar in consultation with the parties. Upon receiving the Board's ruling, counsel for the National Automobile Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) ("CAW") immediately advised the Board that he intended to seek reconsideration of the Board's decision and he did indeed do so by letter dated July 16, 1987.

2. In essence, counsel for the CAW repeats the arguments made orally to the Board on July 15, 1987 in support of his request for reconsideration. He submits that it is plain on the face of the filings in the application for certification and the various complaints under section 89 of the Act that they are all so interrelated that it would be inappropriate not to consolidate them all. Counsel also suggests that the Board's ruling will result in a significant waste of resources in that the CAW and Dresser Canada Inc. ("Dresser") would have to adduce, and the Board will have to hear, the same evidence twice. He also raises as a possibility the spectre of inconsistent rulings. Therefore, submits counsel, the Board erred in declining to consolidate all four proceedings and should reconsider its decision in that respect accordingly.

3. Board File No. 0564-87-R is an application for certification by the CAW for a bargaining unit of employees of the respondent which is described in its application as:

all office, clerical, technical employees of the respondent in the Town of Paris, save and except supervisors, those above the rank of supervisor and sales staff.

The application has subsequently been amended to include all such employees in the Town of Cambridge as well. A group of employees of the respondent who object to the certification of the applicant has intervened.

4. Board File No. 0693-87-U is a complaint by the CAW under section 89 of the *Labour Relations Act* in which the union alleges that Dresser has acted in a manner contrary to sections 3, 64, 66, 70 and 80 of the Act and requests that "the Board certify the applicant as per section 8 and that the grievors be reinstated immediately with full redress".

5. Board File Nos. 0820-87-U and 0821-87-U are identical complaints under section 89 of the Act in which the CAW alleges that Dresser has acted in a manner contrary to sections 64, 66, 70, 72, 75 and 80 of the Act. More specifically, the CAW alleges that Dresser is attempting to "escape" from it and a collective agreement between the parties which covers a bargaining unit of production employees of Dresser in Paris, Ontario. With respect to that aspect of the complaints, the CAW requests relief in the nature of that granted by the Board in *Westinghouse Canada Inc.*, [1980] OLRB Rep. Apr. 577, upheld 80 CLLC ¶14,062 (Ont. Div. Ct.). In addition, the CAW refers to the certification proceedings in Board File No. 0564-87-R and requests that the Board grant a certificate with respect to the same amended bargaining unit set out in paragraph 3 above. The actions of the respondent Dresser which the CAW alleges are improper involve the shifting of its production operations in Paris to its plant in Cambridge. The United Steelworkers of America ("USWA") represents a bargaining unit of production employees, and none of the office, clerical

or technical staff, of Dresser in Cambridge. It has intervened in these two complaints on the basis that the remedy sought by the CAW would “directly and adversely” affect its bargaining rights with respect to those employees.

6. The applicant’s request of reconsideration is based, as was its original motion that all four proceedings be consolidated, on its assertion that the evidence relating to the respondent’s move of its production facilities from Paris to Cambridge is relevant to all four and, further, on the fact that there is an overlap in the relief being requested.

7. Section 106(1) of the *Labour Relations Act* provides that:

The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

The Board’s jurisdiction to reconsider its decisions is a broad one. However, both the Act and the realities of labour relations dictate that the premise must be the Board’s decisions should be final and conclusive for all purposes. The Board’s Practice Note No. 17 accurately sets out the circumstances under which the Board will reconsider a decision. In the interests of certainty and finality, the Board usually will not reconsider a decision unless an obvious error has been made; or, the request raises an important issue of Board policy; or, the Board is satisfied that the party requesting reconsideration proposes to adduce new evidence that it could not, with reasonable diligence, have obtained previously, and that this new evidence, if adduced, would be virtually conclusive of a relevant issue; or, if a party wishes to make representations or objections it had no previous opportunity to make. In this instance, the applicant’s request for reconsideration is based on what it submits is an error by the Board relating to the conduct of these four proceedings.

8. Strictly speaking, the effect of a consolidation is to fuse two or more proceedings into one. Accordingly, consolidation will only be appropriate in circumstances where there is an identity of parties and issues in two or more proceedings. The term has come to be used somewhat more loosely so that “consolidation” may be appropriate where the parties and issues are substantially the same. Technically, it is more appropriate, in such circumstances, that the matters be “heard together” rather than “consolidated”. When matters are heard together, they retain their individual identities but the evidence and representations of the parties with respect to all matters in issue in all the proceedings are heard at one time by one trier of fact and law. Hearing matters together can be a useful alternative to consolidating them into one, where the circumstances are such that consolidation is inappropriate but the practical exigencies make it desirable to have the matters proceed together. The object of either consolidating a number of proceedings, or have them heard together, is the same; that is, to save expense and avoid a multiplicity of proceedings. Underlying these practical concerns are legal considerations; namely, the parties involved and the issues raised in the various proceedings in question. Where the parties and issues are not substantially the same, it will generally not be appropriate or particularly useful to either consolidate the various proceedings or have them heard together. It is trite to say that it will not always be obvious that two or more proceedings should or should not proceed together and the Board, as master of its own procedure, has the discretion to determine the manner in which matters brought before it will proceed.

9. The Board’s first impression with respect to these proceedings was that the application for certification (File No. 0564-87-R) and the section 89 complaint relating thereto (File No. 0693-87-U) affect one group of employees of the respondent and the other two section 89 complaints

(File Nos. 0820-87-U and 0821-87-U) affect another. Upon reflection, however, it appears that all four proceedings potentially affect the respondent's office, clerical and technical employees at both Paris and Cambridge. Consequently, although the group of employees objecting to the certification of the CAW indicate that they do not wish to be involved in the latter two complaints (File No. 0820-87-U and 0821-87-U) they may have a legal interest therein. It does not appear that the USWA has a legal interest in the certification application or the section 89 complaint related thereto. However, there is likely to be a substantial overlap in the evidence relating to Dresser's move from Paris to Cambridge which is relevant to all four proceedings, including the two in which the USWA has a direct interest.

10. In the result, we are persuaded that it would, on balance, be preferable that the matters be heard together (but not consolidated). The Board's oral ruling of July 15, 1987 should be, and it hereby is, varied accordingly. The Registrar is directed to schedule all four proceedings to be heard together. The purpose of the hearing is to hear the evidence and representations of the parties with respect to all matters arising out of and incidental to all four proceedings.

11. The Registrar is further directed to schedule three days of hearing in consultation with the parties. The Board will schedule further days at the beginning of the hearing. In that regard, the parties are directed to come to the hearing prepared to set ten additional dates.

1258-87-U George Hinkson, Complainant v. Canadian Conference of Teamsters, Chemical, Energy & Allied Workers Division, Local 2177, Respondent v. BASF Inmont Canada Inc., Intervener

Duty of Fair Representation - Practice and Procedure - Unfair Labour Practice - Whether complaint should be dismissed on the basis of delay of approximately two years - Delay caused by lack of sophistication, need to obtain legal aid, and change of solicitors - Delay may be taken account in respect of remedy - Board declining to dismiss complaint - Further hearings scheduled

BEFORE: *Robert D. Howe*, Vice-Chair.

APPEARANCES: *Stanley C. Ehrlich* for the applicant; *Rudolph Singh* and *W. H. Mutimer* for the respondent; *Daniel J. Shields*, *Tim J. Murphy* and *Stanley Russel* for the intervener.

DECISION OF THE BOARD; October 29, 1987

1. "BASF Inmont Canada Inc." is added as an intervener, and the name of the respondent is amended to read: "Canadian Conference of Teamsters, Chemical, Energy & Allied Workers Division, Local 2177".

2. On October 26, 1987, the Board, after hearing (and recessing to consider) evidence and argument respecting the intervener's request that this complaint under section 89 of the *Labour Relations Act* be dismissed, without a hearing on the merits, on the basis of extreme delay, the Board made the following oral ruling with respect to that matter:

The complainant was discharged by the intervener in September of 1984. A

discharge grievance was filed, taken through the grievance procedure, and referred to arbitration. The arbitration hearing was scheduled for April 22, 1985. However, the hearing did not take place because the grievance was withdrawn by the respondent on or about April 16, 1985, and the arbitration hearing was cancelled. The complainant was advised of this on or about April 19, 1985. He subsequently telephoned Harry Kopyto, a lawyer whom he had known for a number of years, to request his advice. Mr. Kopyto told him that he could not do anything for him until he obtained a legal aid certificate. Accordingly, the complainant applied for a certificate under the Ontario Legal Aid Plan (referred to in this decision as "legal aid", for ease of exposition). On August 14, 1985, a legal aid certificate was issued for the following purpose:

To negotiate settlement of client's claim for wrongful dismissal and, failing settlement, for an opinion to the Area Director as to recommended procedures.

Mr. Kopyto sent a letter of opinion to the Area Director on or about September 24, 1985. John A. Stockwell, a legal aid solicitor, responded to that letter as follows, in a letter dated October 16, 1985, to Mr. Kopyto:

Further to your letter of September 24th, 1985, recommending that an action be commenced in the Supreme Court of Ontario for conspiracy to commit injurious falsehood, I would advise that Legal Aid in those proceedings is prohibited by Section 15 of the Legal Aid Act and, in particular, Section 15(a). It appears to me that injurious falsehood is something of another way of saying "defamation", see Blacks Law dictionary, page 924, where "injurious words" were considered to mean "slander, or libelous words". In my view the fact that there was conspiracy to commit defamation brings the action within the prohibition containing Section 15(a), that is, "proceedings wholly or *partly* in respect of defamation...".

It appears to me that the only proceeding that is available to Mr. Hinkson is to apply to the Labour Relation Board for an order directing the Union to represent him in respect to this grievance for wrongful termination of his employment or, failing the Boards [sic] order, an action against the Union for breach of its duty to represent Mr. Hinkson.

I have, therefore, enclosed an amendment to the certificate authorizing an application to the Ontario Labour Relations Board for an order directing the Union to represent Mr. Hinkson with respect to his grievance for wrongful termination of his employment.

I have put this file away until April 14th, 1986, at which time, if I have not heard from in the interim, I will contact you with a view to obtaining a report on the status of this matter at that time.

On January 20, 1986, Mr. Stockwell sent to the complainant and to Mr. Kopyto a notice of cancellation of the aforementioned legal aid certificate issued on August 14, 1985. The complainant did not receive that notice because he had moved in late 1985 or early 1986, and had not provided the post office with a change of address notification because he understood that it cost \$10 to do so. He also did not notify Mr. Kopyto or legal aid of his new address.

The complainant contacted Mr. Kopyto a month or two after he moved, and was advised by Mr. Kopyto that the legal aid certificate had been cancelled because the legal aid office wanted some additional information from him

(the complainant) and had been unable to contact him. It was also the complainant's evidence that "sometime in 1986" he contacted Angie Codina, another lawyer, to seek advice. He was unable to recall when in 1986 that contact was made. On February 20, 1987, another legal aid certificate was issued, entitling the complainant to legal aid "for rep. on application to Ontario Labour Relations Board for order directing union to represent client with respect to grievance for wrongful termination". That certificate was acknowledged by Ms. Codina on March 9, 1987. However, the complainant did not have as much confidence in Ms. Codina as he had in Mr. Kopyto. Thus, he decided to return to Mr. Kopyto for representation. Subsequent efforts to resolve the matter through informal contacts with the respondent did not meet with success. The instant complaint was filed with the Board on August 10, 1987.

Counsel for the intervener submits that this complaint should be dismissed by the Board without a hearing on the merits, on the basis of extreme delay. Counsel for the complainant concedes that there has been some delay, but submits that it is not sufficient to warrant dismissal. Counsel for the respondent takes no position regarding this preliminary issue.

The Board has had occasion to consider the effect of delay in filing a section 89 complaint in a number of cases. In *The Corporation of the City of Mississauga*, [1982] OLRB Rep. March 420, the Board wrote, in part, as follows:

20. It is by now almost a truism that time is of the essence in labour relation matters. It is universally recognized that the speedy resolution of outstanding disputes is of real importance in maintaining an amicable labour-management relationship. In this context, it is difficult to accept that the Legislature ever envisaged that an unfair labour practice, once crystalized, could exist indefinitely in a state of suspended animation and be revived to become a basis for litigation years later. A collective bargaining relationship is an ongoing one, and all of the parties to it - including the employees - are entitled to expect that claims which are not asserted within a reasonable time, or involve matters which have, to all outward appearances, been satisfactorily settled, will not re-emerge later. That expectation is a reasonable one from both a common sense and industrial relations perspective. It is precisely this concern which prompts parties to negotiate time limits for the filing of grievances... and arbitrators to construct a principle analogous to the doctrine of laches to prevent prosecution of untimely claims....

22. A perusal of the Board cases reveals that there has not been a mechanical response to the problems arising from delay. In each case, the Board has considered such factors as: The length of the delay and the reasons for it; when the complainant first became aware of the alleged statutory violation; the nature of the remedy claimed and whether it involves retrospective financial liability or could impact upon the pattern of relationships which has developed since the alleged contradiction; and whether the claim is of such nature that fading recollection, the unavailability of witnesses, the deterioration of evidence, or the disposal of records, would hamper a fair hearing of the issues in dispute. Moreover, the Board has recognized that some latitude must be given to parties who are unaware of their statutory rights or, who, through inexperience take some time to properly focus their concerns and file a complaint. But there must be some limit, and in my view unless the circumstances are exceptional or there are overriding public policy considerations, that limit should be measured in months rather than years.

In *Sheller-Globe Canada Limited*, the Divisional Court, in a unanimous

judgment dated June 28, 1983, dismissed an application for judicial review of a Board decision (reported in [1982] OLRB Rep. Jan. 113) in which the Board, after entertaining evidence and submissions with respect to delay in filing a section 89 complaint alleging a breach of section 68 of the *Labour Relations Act*, declined to inquire into the merits of the complaint in the exercise of its discretion under section 89 of the Act and, accordingly, dismissed the complaint. (See also *John T. Hepburn Limited*, [1984] OLRB Rep. Jan. 39; *Waterloo Metal Stampings Inc.*, [1984] OLRB Rep. Jan. 156; *Stelco Inc.*, [1983] OLRB Rep. Dec. 2102; *Caravelle Foods*, [1983] OLRB Rep. June 875; *Chrysler Canada Limited*, [1983] OLRB Rep. Apr. 490; *Chrysler Canada Limited*, [1982] OLRB Rep. Oct. 1417; *Concrete Construction Supplies*, [1982] OLRB Rep. Oct. 1446; and *CCH Canadian Limited*, [1977] OLRB Rep. June 351.)

The instant case falls close to the line. There has been some delay by the complainant, and also some delay by the counsel who were representing him from time to time. By mid October of 1985, legal aid had authorized Mr. Kopyto to apply to the Board for an order directing the respondent to represent the complainant in respect of his grievance. Mr. Kopyto's failure to file the complaint during the two and a half month period preceding the cancellation of the complainant's legal aid certificate involved some unexplained delay, but was certainly not so extreme as to warrant the dismissal of this complaint. With the cancellation of the legal aid certificate, Mr. Kopyto no longer had authorization from legal aid to file a complaint on behalf of the complainant. The complainant's failure to provide Mr. Kopyto and legal aid with his new address delayed his becoming aware of that cancellation. His decision to seek advice from another solicitor and then to return to Mr. Kopyto further postponed the filing of this complaint. There was also a delay of approximately five and a half months between the time that the February 20, 1987 legal aid certificate was issued and the time when this complaint was filed with the Board.

The complainant's lack of sophistication regarding labour law matters, and his need to obtain legal aid, complicated by his change of address and change of solicitors, account for some of the time which elapsed between the withdrawal of his grievance and the filing of this complaint. However, there are several months of delay which have not been adequately explained. On the other hand, the respondent against which this complaint is directed does not seek to have it dismissed without a hearing on the merits. That position is asserted only by the intervener, which did not establish any specific prejudice, such as destruction of pertinent evidence, or death of a key witness. The loss of memory which generally accompanies the effluxion of time is, of course, a factor to be taken into account, as is the nature of the remedies sought by the complainant, namely, reinstatement by the intervener with compensation from the respondent and from the intervener for lost earnings.

Having regard to all of the circumstances, I have concluded that although there has been some unwarranted delay in filing this complaint, the delay is not so extreme, and has not given rise to sufficiently substantial prejudice, to warrant the dismissal of this complaint without a hearing on the merits. However, the delay may well be a factor to be taken into account in respect

of the remedy to be awarded in the event that a statutory violation is established.

Accordingly, the Board declines to dismiss this complaint without a hearing on the merits.

3. The Registrar is directed to list this matter for hearing before the writer on January 12, 14, and 27, 1988. The purpose of that hearing will be to hear the evidence and representations of the parties with respect to all unresolved matters arising out of and incidental to this complaint, including the merits of the complaint.

1448-87-R United Brotherhood of Carpenters & Joiners of America, Local Union 27, Applicant v. Hollingworth Drain Services, Respondent

Certification - Parties - Practice and Procedure - Applicant requesting hearing to determine status of intervener prior to officer examinations - Issues of law to be dealt with after officer has reported to Board - Officer ordered to continue with enquiry

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *D. A. MacDonald* and *J. Redshaw*.

DECISION OF THE BOARD; October 16, 1987

1. By letter dated October 5, 1987, the applicant, through his counsel, requested that the Board convene a hearing to deal with the issue of the status of the intervener prior to the examinations scheduled by the Labour Relations Officer authorized by the Board to enquire into and report to the Board with respect to the list and composition of the bargaining unit herein.
 2. The procedure relating to enquiries conducted by Labour Relations Officers is set out in Board Practice Note #4. For matters not specifically dealt with by Practice Note #4, the appropriate procedure to follow is by analogy to it. Practice Note #4 contemplates that all parties be given an opportunity to examine those witnesses whom they choose to call and to cross-examine those witnesses called by another party or who are initially examined by the Officer. Issues of law, including preliminary ones such as the status of a party to participate in a proceeding, are appropriately dealt with after the Board has received the Labour Relations Officer's report and the submissions of the parties with respect thereto.
 3. In our view, it would not be appropriate for the Board to depart from its usual practice in this case. Accordingly, the applicant's request is denied and the Board Officer is directed to continue with his enquiry.
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1594-87-R International Brotherhood of Electrical Workers, Local 1687, Applicant v. John Anthony Waite c.o.b. as J. C. Electric, Respondent

Certification - Construction Industry - Practice and Procedure - Respondent requesting a hearing on basis that certification will cause him hardship - Hearing denied - Certificates issuing

BEFORE: *Harry Freedman*, Vice-Chair, and Board Members *W. H. Wightman* and *J. Redshaw*.

DECISION OF THE BOARD; October 21, 1987

1. In this application for certification the applicant filed three combination applications for membership and receipts. The combination applications for membership are signed by the employees and the receipts are countersigned and indicate that a payment of \$1.00 has been made within the six-month period immediately preceding the terminal date of the application. The money was collected by one person. The applicant also filed a duly completed Form 80, Declaration Concerning Membership Documents, Construction Industry.
2. The respondent filed a reply, a list of employees containing five names on Schedule "A", one name on Schedule "D" and specimen signatures within the time fixed in accordance with the *Labour Relations Act* and the Board's Rules of Procedure.
3. A timely statement expressing opposition to the application was also filed, containing the names and signatures of two employees whose names appear on the schedules of employees filed by the respondent. There is also the name and signature of a third person purporting to be a witness to the signing of the statement. That third person's name does not appear on the schedules of employees filed by the respondent.
4. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on December 12, 1977, the designated employee bargaining agency is The International Brotherhood of Electrical Workers and the IBEW Construction Council of Ontario.
5. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

"An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition."

6. The respondent in its reply requested a hearing of this matter. The grounds for requesting the hearing are set out in paragraph 13 of its reply where the respondent states:

"I request a hearing in this application on the following grounds.

1) It cannot be allowable that an electrician hired on a temporary 2 week basis such as Carlo Provenzano or an apprentice such as Dave Richard, hired temporarily to replace an indentured apprentice who had the misfortune to break his leg should have a vote on a matter that affects the livelihood of three permanent employees and myself.

2) I request relief on the grounds that my company is the product of the New Ventures Loan Program, through the Ministry of Industry, Trade and Technology.

In this program there is a two year layout in which I am contractually obligated to work as an electrician myself and to use a total package wage scale of not more than \$15.00 per hour.

As a former member of the I.B.E.W. Local 1687 I believe their wage scale to be total package (benefits included) in excess of \$25.00 an hour.

This would put my company out of business and cause failure of the loan (\$15,000.00) to the New Ventures Program.

Since the competition in the Sault area is 90% non union e.g Glenn Contracting, Lawrence Electric, Norwon Electric, O'Connor and Soltys, Permanent Electric, Phase 4 Electric, S. & T. Electric, and Soo Electric.

The union shops other than one man companies are Mutual Electric and Elteck Electric.

My permanent employees will be reduced from gainful wage earners to unemployed union members on the bottom of a 100 man waiting list (approx.) or they may be offered jobs in remote areas of Northern Ontario, miles away from home.

My permanent employees have expressed to me that they would prefer full time employment and to be able to work in the Sault and are willing to sacrifice the extra earnings promised by membership in the union for these benefits.

I know the above statement is true because as a former member of Local 1687 I spent more than half of my career travelling to different cities for employment and this is the primary reason that I dropped my union card and started my own electrical company approximately 1 year ago. Not to mention the 3 years previous to this the union could not provide me with employment at all and I had to seek employment for myself.

3) At this hearing I will bring representation from the New Ventures Program, financial structure of the company and proof of the temporary nature of two of the employees on the date of application September 10, 1987."

7. The Board has the discretion under section 102(14) of the *Labour Relations Act* not to schedule a hearing in connection with applications for certification in the construction industry. A hearing is necessary where there is a material fact in dispute or where a party to the proceeding raises an issue which requires further argument before it can be dealt with by the Board. In our opinion, the matters raised by the respondent do not require a hearing.

8. With respect to the first ground raised, the Board is directed by the Act to make the assessments required by sections 7 and 144 as of a particular point in time. Employment can fluctuate, particularly in the construction industry, and in order to establish both certainty and expedition in the processing of these kinds of applications, the Board has regard to the employees of the respondent who were working in the bargaining unit on the date of the making of the application. Therefore, there is no need to hear further submissions from the respondent on whether an

employee who was away from work for several weeks at the time the application was made should be included for purposes of determining the degree of support the union enjoyed among the employees in the bargaining unit.

9. Similarly, whether an employee is permanent or temporary is of no consequence. Employment in the construction industry is characterized by short-term jobs and fluctuations in employee complement. Since the *Labour Relations Act* requires determinations to be made as of a specific point in time, the Board in construction industry applications does not consider an employee's length of employment or prospect for future employment with the employer as being relevant to whether an employee is to be considered in making the requisite determinations under sections 7 and 144 if that employee was at work in the bargaining unit on the date of application.

10. As for the other two grounds raised by the respondent, the Board in certification applications is required to make assessments about the degree of membership an applicant has among the employees in the unit of employees found to be appropriate for collective bargaining.

11. We accept as proved all of the factual assertions made in the respondent's reply. Those facts however are not relevant to the determination of the issues before us since they are all consequences that arise from the issuance of a certificate but do not relate to issues that must be determined by the Board under sections 7 and 144. We note here that the description of the appropriate bargaining unit in this case is mandated by section 144 of the Act.

12. The Board does not consider the consequences of issuing a certificate other than in making the determination of the appropriate bargaining unit. This approach was clearly stated by the Board as early as 1950 in *Sinclair Cut Stone and Construction Company Limited*, 52 CLLC ¶17,009 where the Board wrote:

"We wish also to express the opinion that the question whether certification will, in a particular case, be of benefit to the employees affected or will pose difficult problems for the parties concerned is not one for consideration by the Board. An applicant which meets the necessary requirements is entitled to certification for what it is worth. It is not the function of the Board to endeavour to estimate the probable future value of certification."

See also *Toronto Driving Club Ltd.*, [1964] OLRB Rep. April 33; *Guelph Beef Center Inc.*, [1977] OLRB Rep. March 184 at 190.

13. The respondent, in our view, is asking the Board to prevent the applicant from obtaining certification under the Act because of the hardship that certification will cause to him. The Act gives trade unions the right to seek certification. It would be improper to deprive the applicant of its right to obtain certification because certification will create severe difficulties for the respondent.

14. We also observe here that the consequences of certification of the applicant in respect of the respondent's work in the industrial, commercial and institutional sector of the construction industry is mandated by the *Labour Relations Act*. The parties, however are free to bargain in respect of work done by the respondent outside of the industrial, commercial and institutional sector of the construction industry provided there is no certificate of accreditation by which the applicant is bound in the geographic area that is affected by this application.

15. Furthermore, the statement of opposition does not have any bearing on the disposition of this matter since none of the employees who are members of the applicant signed the statement in opposition. See *Unlimited Textures* [1984] OLRB Rep. Jan. 138.

16. The Board further finds, pursuant to section 144(1) of the Act, that all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all electricians and electricians' apprentices in the employ of the respondent in all other sectors of the construction industry in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

17. We observe here that the respondent placed himself on the list of employees. The respondent is the employer and as an employer cannot at the same time be an employee. Therefore, on the basis of the material filed, the Board is satisfied that there were four employees in the bargaining unit on the application date. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on September 21, 1987, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

18. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

..., the Board shall certify the trade unions as the bargaining agent of the employees in *the bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

[emphasis added]

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 4 above in respect of all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

19. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all electricians and electricians' apprentices in the employ of the respondent in all other sectors of the construction industry except the industrial, commercial and institutional sector in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman.

2619-86-M Kimberly Clark of Canada Ltd., Applicant v. Lumber and Sawmill Workers' Union, Local 2693, Respondent

Employee Reference - Whether persons performing a mixed job of "security guard" and clerk employed as "guards" within the meaning of the Act - Actual duties never placing persons in position of possible conflict of interest with other employees - Board finding that persons not employed as guards

BEFORE: *R. A. Furness*, Vice-Chair, and Board Members *H. Kobryn* and *D. A. MacDonald*.

DECISION OF THE BOARD; October 8, 1987

1. The applicant has requested the Board to determine, pursuant to section 106(2) of the *Labour Relations Act*, whether certain individuals are guards. In its letter dated December 16, 1986 the applicant did not refer to these individuals by name. In a letter dated January 20, 1987, the respondent stated that the persons alleged by the applicant to be guards had not acted as guards. The respondent adopted the position that these persons have been employed by the applicant in various capacities outside the bargaining unit. The respondent also stated that in a recent cutback in operations, the applicant assigned these employees to do work which was normally and incidentally work of the bargaining unit in order to avoid laying them off from work. It was the position of the respondent that the collective agreement between the applicant and the respondent had for a long period of time provided for the positions of watchman; watchman, night firing stoves; and watchman, gateman. The respondent claimed that the work done by the named persons, for a long period of time, was work that had been recognized by the applicant as being work of the bargaining unit. The respondent then proceeded to list the names of these persons together with accompanying comments. The list referred to by the respondent contains the following names: W. Pennock, B. Downey, B. Larocque, W. Muir, G. Kald, G. Pengally, B. McCracken, G. Selinger, P. Turcotte, S. Salerno, J. Young and A. Doi. On March 6, 1987, a Labour Relations Officer was appointed "to inquire into the duties and responsibilities of the disputed individuals".

2. The Report of the Labour Relations Officer was dated August 21, 1987. The respondent made written representations to the Board in a letter dated August 31, 1987, and the applicant made written representations to the Board in letters dated September 1 and 3, 1987. Neither the applicant nor the respondent requested a hearing before the Board.

3. The Report recites that "the parties to this application agree that the evidence adduced by Mr. Joe Young shall be representative of himself and all others named in the letter to the Board by the applicant (dated January 5, 1987) [sic] described as security personnel. The parties further agree that the Board, in applying its decision, shall apply it to all the persons in dispute". At the conclusion of the examination each party was asked if it had further witnesses and/or evidence that it wished to present. Each party said that it did not. In its letter dated August 31, 1987, the respondent included therein an unsigned one-page document entitled "Evidence of Fred Miron". In its letter dated September 3, 1987, the applicant objected to this document as improper and irrelevant. The unsigned one-page document has not been taken into account by the Board in reaching its decision in this matter. The Board rejects this document. Such "evidence" ought to have been raised and presented before the Labour Relations Officer during his examination. The respondent had every opportunity to endeavour to introduce such evidence and failed to do so.

4. During the months of September and October of 1986, Mr. Young's occupation was that of a warehouse receiving parts clerk. In this capacity he received all incoming goods, directing charge orders and consigning orders through the warehouse for the Woodlands Division. He also

worked as a security guard during that period of time. Mr Young spent about two-thirds of this time period as a security guard and one-third of this time period as a warehouse receiving parts clerk. His main function as a security guard was to keep track of vehicles coming in and out of the applicant's property and to keep a log of these events. In this log he recorded the licence numbers of vehicles, dates and times. He also patrolled the property in order to forestall vandalism, trespassing and fires. Mr. Young had never previously worked as a security guard and he did not receive any special training. He is not licensed, has not been designated as a special constable under the *Police Act* and has not received a security clearance code. He reported to Dan Koroscil while working as a security guard. Mr. Koroscil worked out of one office and apparently served in the dual capacity of warehouse supervisor and supervisor of security.

5. During the course of an eight-hour shift, Mr. Young spent the greatest amount of time at the gate monitoring the ingress and egress from the applicant's property. During the patrols the gate was left unattended. The patrols were conducted every thirty minutes and lasted between ten and fifteen minutes. He had in his possession the keys for all the buildings and the gas pumps and such keys were entrusted to the security guard on the gate. Mr. Young was not empowered to carry firearms, did not wear a uniform, distinguishable mark or insignia. He was neither asked nor empowered to investigate fraud or property damage. He was not asked to make either a written or a verbal report at the end of each shift. He received the same pay and benefits whether he worked as a warehouse receiving parts clerk or as a security guard. Mr. Young was initially hired as a clerk and stated in his evidence that he regarded the guard duty as incidental to his main function.

6. Prior to commencing work as a security guard, Mr. Young read and signed a position description for the position of security officer. The position description refers to a wide variety of duties which are clearly more detailed and complex than the duties which Mr. Young actually performed. For example, the position description refers to "Carry out and enforce all Company policies and security procedures and/or instructions,...Initiate necessary disciplinary action commensurate with Company policy when necessary". Mr. Young stated in his evidence that he did not know about initiating discipline commensurate with company policies. He also stated that it was not part of his duties to discipline employees. While the position description refers to conducting vehicle searches, he has never checked materials in and out of the applicant's property. While he is authorized to do body searches, he has neither conducted body searches, arrested, detained employees nor inspected employees' lunch pails. When he is working in the warehouse he is not a part of management and he uses the same locker when working either as a clerk or as a security guard. Even while working as a security guard, if someone wanted something from the warehouse they would come to Mr. Young and have him get it. Other security guards were obtained from other departments within the applicant. Mr. Young was not involved in the issue of pass cards to employees of the applicant.

7. The position description is cast far more widely with respect to powers and scope of a security officer than the reality of the actual functions performed by Mr. Young. The Board, of course, considers the actual duties performed by a person in dispute rather than the position description which in this application is clearly theoretical in nature.

8. Sections 106(2) and 12 of the *Labour Relations Act* provide:

106.-(2) If, in the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee or as to whether a person is a guard, the question may be referred to the Board and the decision of the Board thereon is final and conclusive for all purposes.

12. The Board shall not include in a bargaining unit with other employees a person employed as a guard to protect the property of an employer, and no trade union shall be certified as bargain-

ing agent for a bargaining unit of such guards and no employer or employers' organization shall be required to bargain with a trade union on behalf of any person who is a guard if, in either case, the trade union admits to membership or is chartered by, or is affiliated, directly or indirectly, with an organization that admits to membership persons other than guards.

The underlying principle behind recognizing the duties of a guard as creating a special category of employment relationship arises from the perceived conflict in loyalties of a guard with respect to his employer and other employees in a bargaining unit. In *Wells Fargo Armcar Inc.*, [1981] OLRB Rep. July 1046 at page 1051, the Board expressed it as follows:

The test is whether duties of the persons who are claimed to be guard for purposes of section 11 raise the real possibility of a conflict of interest with respect to other employees of their employer....

In *George A. Crain & Sons Ltd.*, 63 CLLC ¶16,291, the Board recognized the distinction between guards and watchmen who are included in bargaining units.

9. A fair reading of the evidence of Mr. Young establishes that he performs a mixed job of "security guard" and clerk and that he regards his guard duty as incidental to his main function as a clerk. His actual duties have never placed him in the position of a possible conflict of interest with other employees in that his duties have been primarily those of watching, warning and reporting on activity. He has exercised virtually none of the monitorial or regulatory authority, real or potential normally associated with guards over other employees.

10. Having regard to the foregoing facts and principles, the Board finds that, in this application under section 106(2) of the *Labour Relations Act*, the persons in dispute were not employed by the applicant as guards.

0212-87-R Christian Labour Association of Canada, Applicant v. King Nursing Home Ltd., Respondent

Bargaining Unit - Certification - Whether graduate and registered nurses should be excluded from an all employee nursing home service unit on basis of community of interest or past practice - Board not prepared to conclude that past practice in hospital sector should be applied to nursing home sector - Past practice in nursing home sector ambiguous - Respondent making no submissions with respect to community of interest factors - Board determining that all employee unit viable

BEFORE: Robert J. Herman, Vice-Chair, and Board Members B. L. Armstrong and J. A. Rundle.

APPEARANCES: Hank Kuntz, Ed Pypkar and Maynard Witvoet for the applicant; T. F. Storie, Janice King and Mrs. King for the respondent.

DECISION OF ROBERT J. HERMAN, VICE-CHAIR AND BOARD MEMBER B. L. ARMSTRONG; October 7, 1987

1. In a prior decision dated June 22, 1987, the Board, pursuant to its discretion under sec-

tion 6(2) of the Act, certified the applicant on an interim basis as bargaining agent for two bargaining units of the respondent.

2. The parties were in partial agreement with respect to the description of the appropriate bargaining units. They disagreed as to whether graduate and registered nurses ought to be included. The applicant submitted that graduate and registered nurses ought to be included on community of interest grounds. The respondent submitted they ought to be excluded on the same grounds.

3. As part of our prior decision, the Board invited written submissions with respect to this issue. Both parties availed themselves of this opportunity. Although notice of the application was posted in the workplace, advising employees that the applicant was seeking an “all employee” bargaining unit (including the graduate and registered nurses of the respondent), no employee filed written representations or appeared at the hearing in order to address this issue. None of the nurses asserts that s/he should be excluded from the applicant’s proposed bargaining unit.

4. The sole issue remaining for the Board, then, is whether to include the graduate and registered nurses in the applicable bargaining units. We can succinctly set out the position of the respondent by quoting an excerpt from the written representations it addressed to the Board:

“The Respondent takes the position that graduate and registered nurses should not form part of an ‘all employee’ unit for a number of reasons. Without reiterating submissions made to the Board, they include a community of interest and the Board’s consistent practice, particularly in the health care sector, in certifying graduate and registered nurses in separate bargaining units in accordance with its mandate under Section 6(1) of the Ontario Labour Relations Act. There are no particular facts in the instant case which would support any change in this practice. By illustration, the graduate and registered nurses are sufficient in number so that they would not be disenfranchised from their right to Union representation if excluded. Therefore, their exclusion in the instant case is justified.

In addition to representative certifications cited by me at the hearing on May 15th, I have now conducted a review of certifications issued by the Board in the health care sector involving various Hospitals and Nursing Homes whose employees are represented by the Applicant, the Canadian Union of Public Employees, Service Employees International Union (including London and District Service Workers) and Ontario Public Service Employees Union back to 1984 to ascertain the Board’s practice regarding the exclusion of graduate and registered nurses from ‘all employee’ units.

That review confirms my submissions to the Board and is consistent with the text of Sack and Mitchell (second edition) at page 165, paragraph 3:3410 to the effect that service units invariably exclude nursing staff and other technical personnel. In those certificates where such persons have not been specifically excluded it is impossible to ascertain whether or not there were any incumbent graduate or registered nurses and no doubt those bargaining unit descriptions would be consistent with Board practice in refusing to exclude classifications where no incumbents were employed as of the date of application. At the same time, the majority of bargaining units where no specific exclusion is provided were settled by the agreement of the parties. In such a case, I have found no precedent to support the position of the Applicant in the instant case where the Board has dealt with the specific issue in this case.”

The respondent does not suggest that any of the individuals in question ought to be excluded on the grounds that they exercise managerial functions or are employed in a confidential capacity within the meaning of section 1(3)(b) of the *Labour Relations Act*. As the representations above indicate, the respondent challenges their inclusion on community of interest and past practice.

5. Turning first to whether past practice supports the respondent’s view “that service units invariably exclude nursing staff and other technical personnel”, we are unable to conclude that

past practice supports the necessary exclusion of the registered and graduate nurses. The text of “Sack and Mitchell (second edition) at page 165”, to which we were referred, deals on its face with the Board practice with respect to hospital bargaining units, and not bargaining units in the nursing home sector. We are not prepared to conclude, absent any evidence or submissions on this point, that the two sectors ought to be treated identically.

6. Neither party was able to direct the Board to a prior decision where the Board specifically considered whether it was appropriate to exclude registered and graduate nurses from a service unit in a nursing home. Prior cases where the Board has done so, have either been on agreement of the parties or without reasons being given for such exclusion. Similarly, those cases which have included registered and graduate nurses in such units have not specifically canvassed the community of interest considerations relevant to the determination (see, for example, *Villacentres Limited*, [1973] OLRB Rep. Dec. 646). In short, we cannot conclude that past practice with respect to this issue has been either invariable or clear. Further, to the extent that prior decisions seem to favour the exclusion of the registered and graduate nurses, they do not provide any rationale or analysis of why such exclusion is appropriate or why inclusion would be inappropriate, and accordingly provide little guidance. This is not a situation where the applicant might have been hindered in its organizing by reliance upon past practice, as in the instant proceeding it is the applicant who seeks the wider “all employee” bargaining unit. In summary then, the purported “practice” or “precedents” relied upon by the respondent do not point, unequivocally, to the conclusion it urges upon us.

7. We turn next to whether we ought to exclude these individuals on community of interest grounds. No *viva voce* evidence was led at the hearing. The parties were content to provide the facts by way of submissions and agreement with the submissions. However, other than submissions of a general nature (for example, the statement that registered nurses are distinguishable and separable from other employees in a service bargaining unit) the respondent provided no facts nor made any submissions with respect to the usual community of interest factors. We were not told how the nursing home operates, nor were we told the duties and responsibilities, and conditions of employment, of the nurses and R.N.A.’s. The only submissions in this vein were with respect to the history of bargaining and past practice, which matters we have dealt with above, and which do not appear to support the exclusion of the individuals in question. The Board must decide whether it is inappropriate to include registered and graduate nurses, when the respondent submits that it would be inappropriate to do so on community of interest grounds, but provides no facts or assertions to suggest why in this particular bargaining unit community of interest and labour relations considerations demand such exclusion.

8. In determining the appropriate bargaining unit, we accept as correct the approach articulated by the Board in *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, where the Board wrote (at paragraph 23 therein):

“Does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer.”

This approach has been approved and applied in subsequent Board cases: *TV Guide Inc.*, [1986] OLRB Rep. Oct. 1451, *Harlequin Enterprises Limited*, [1987] OLRB Rep. Feb. 226 and *The Ottawa Citizen, a Division of Southam Inc.*, [1987] OLRB Rep. Aug. 1098.

9. In the instant case, we are satisfied that the employees in the “all employee” bargaining unit sought by the applicant union exhibit the necessary community of interest so that they can bargain on a viable basis. Neither the evidence before us nor the parties’ arguments persuade us to the

contrary. No factors were raised which suggest that the registered and graduate nurses would not have a sufficient community of interest with the other employees the parties agreed ought to be in the unit or that further fragmentation of the bargaining structure would be desirable. As we noted above, no facts or argument were presented to the Board suggesting how inclusion might cause serious labour relations problems for the employer. Neither was any evidence addressed to the usual factors considered by the Board as set out in, for example, *Usarco Limited*, [1967] OLRB Rep. Sept. 526.

10. In these circumstances, we are satisfied that the bargaining units applied for are appropriate, and they ought to include the registered and graduate nurses. We do not wish this decision to be taken to mean that the Board considers it appropriate in other circumstances to include registered and graduate nurses in an "all employee" unit in a nursing home. That question remains to be canvassed and considered in a proceeding in which the Board has before it the relevant factual context.

11. Accordingly, the Board finds that the following two bargaining units are appropriate for collective bargaining:

Bargaining Unit #1:

all employees of the respondent in Bolton, save and except the administrator, the director of care, supervisors and persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period,

Bargaining Unit #2:

all employees of the respondent in Bolton regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except the administrator, the director of care, supervisors, and persons above the rank of supervisor, office and clerical staff.

12. Formal certificates will issue forthwith.

DECISION OF BOARD MEMBER J. A. RUNDLE;

1. I dissent from the decision of the majority and would not have included graduate and registered nurses in the bargaining unit applied for by the applicant.

2. Does the Ontario Labour Relations Board (OLRB) act as an Arbitration Board, deciding issues based on the facts and circumstances of a given individual bargaining relationship, or should this Board make decisions based on a consistent and ultimately predictable interpretation of the Labour Relations Act? It is my strongly held view that since the OLRB has a much different role than an Arbitration Board, it must act in a consistent fashion to enable all parties affected by labour relations questions in Ontario to understand the rules of the game. If the ground upon which the labour relations framework is built is in reality shifting sands, the Board does nothing to further harmonious labour relations between employers and employees. Unpredictability of Board decisions can only lead to discord between the parties and a greater number of confrontations coming to the Board for resolution.

3. Precedent is therefore an important cornerstone of every decision we make. What is Board precedent, relative to the issues in this case? The Board has consistently decided that Reg-

istered Nursing Assistants (RNA's) should be included in a service unit. On this issue, see *Riverside Hospital of Ottawa*, [1971] OLRB Rep. Jan. 10; *Altamont Nursing Home Limited*, [1971] OLRB Rep. July 361; *McKellar General Hospital*, [1971] OLRB Rep. June 312; *Smith Falls Public Hospital*, [1973] OLRB Rep. July 394 and *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266. The Board has consistently decided that RNA's should not be included in a Registered Nurses' (RN) bargaining unit. On this issue see *The Wellesley Hospital* [1974] OLRB Rep. Jan. 55.

4. A careful reading of the cases referenced above will reveal that the evidence has supported an argument that a greater community of interest exists as between RNA's and RN's relative to RNA's and service workers. Notwithstanding the facts and evidence adduced in these cases, the Board felt bound by earlier precedents. In fact in *Hospital for Sick Children* the Board acknowledged that while in retrospect RNA's may well have been included in a bargaining unit with RN's, it was now too late to say that they should not be included in a service unit.

5. Therefore, notwithstanding clearly enunciated views as to how history might be re-written, the Board precedents are unambiguous.

RNA's are to be included with service Bargaining Units.

RNA's are not to be included with RN Bargaining Units.

Presumably the principles of logic can be applied to extrapolate upon these precedents. That is:

1. If RNA's cannot be certified with RN's, then it is obviously true that RN's cannot be certified with RNA's.
2. If RN's cannot be certified with RNA's and RNA's must be certified with service employees, then it also follows that RN's cannot be certified with service employees.

6. This decision from which I strongly dissent jumps over these logical conclusions. The majority in its decision states that the respondent provides no facts or assertions in this particular bargaining unit concerning community of interest or labour relations considerations. Why does the Board conclude that *viva voce* evidence would provide anything more than what the Board heard in *Hospital for Sick Children*? That Board found as the evidence that if it were to decide again, RNA's may more appropriately be included with RN's. But the final decision, which was contrary to the evidence adduced, was based on past precedents. These precedents formed the basis of the facts and assertions of the respondent before this Board.

7. This decision changes precedent and therefore establishes a new precedent. I do not understand how the majority can state that it "does not wish this decision to be taken to mean that the Board considers it appropriate in other circumstances to include registered and graduate nurses in all employees' unit in a nursing home". The decision *does* stand for a distinct and new approach in nursing homes. To repeat earlier comments, Board decisions must be seen as the rules governing the game. Harmonious labour relations could not be fostered unless this was so.

8. The earlier Board cases received evidence which would support a decision similar to that of this Board but declined to do so based on precedent. This decision cannot, therefore, be challenged on evidence relating to job duties or labour relations considerations. This decision can only stand for a distinction between Nursing Homes and Hospitals. This distinction must be so compelling and implicitly obvious that it outweighs the past decisions of the Board and required no

specific evidence for the majority to so conclude. I am certain that the Unions involved in the nursing home industry will be dismayed at this decision and what it stands for.

9. In conclusion, I would not have found that the differences between Nursing Homes and Hospitals, no matter how great, was sufficient to reverse the Board policy on these matters.

1362-87-R International Woodworkers of America, Applicant v. Kirouac Contracting Ltd., Respondent v. Lumber and Sawmill Workers Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, Intervener #1 v. Canadian Paperworkers Union, Intervener #2

Certification - Practice and Procedure - Pre-Hearing Vote - Employees involved in these applications among those whose inclusion in the unit is in dispute in another case where pre-hearing vote has been held and ballot box sealed - Whether these applications should be postponed pending the outcome of that case, consolidated for hearing with that case pursuant to section 103(3), or processed by ordering a pre-hearing vote as originally applied for - Section 103(3) decision deferred and pre-hearing vote ordered

BEFORE: *Judith McCormack*, Vice-Chair, and Board Members *D. A. McDonald* and *J. Sarra*.

DECISION OF THE BOARD; October 16, 1987

1. This is an application for certification in which the applicant, the International Woodworkers of America ("IWA") has requested that a pre-hearing representation vote be taken. The Canadian Paperworkers Union ("CPU") filed a subsequent application for certification by way of intervention in these proceedings, also requesting a pre-hearing representation vote. The Lumber and Sawmill Workers Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America ("LSWU") has intervened on the basis that it is an incumbent union by virtue of a two-page document dated April 29, 1971.

2. A dispute has arisen with respect to the status of the employees of the respondent. To understand that dispute, it is necessary to refer to other proceedings before the Board with respect to Great Lakes Forest Products Limited ("Great Lakes") (Board Files 1283-87-R and 1253-87-R). In those proceedings, the IWA applied for certification requesting a pre-hearing representation vote and the CPU filed a subsequent application to the same effect. The LSWU intervened on the basis that it was an incumbent union by virtue of a collective agreement dated March 1st, 1985. These parties were in dispute with respect to the description of the appropriate bargaining unit and the voting constituency. The collective agreement in that case provided as follows:

3.01 (a) The Company recognizes the Union as the sole collective bargaining agency for all of its employees who are engaged in woods operations on the limits, and on the work sites, of the Company. For purposes of this article, Company employees shall be all those employed in the job classifications set out in the wage schedule attached to and forming a part of this Agreement, including those who are employed on job classifications which may be established and become part of the attached wage schedule during the term of this Agreement.

3.01 (b) The employees of contractors engaged by the Company on the limits and work sites of the Company shall be considered employees within the terms of this Agreement; save and

except the employees of contractors and/or the contractors who are engaged to perform occasional special services not commonly performed by employees covered by the terms of this agreement, employees of contractors where such contractors are engaged for the purpose of erecting structures and where such a contractor is bound by an Agreement with a union or unions affiliated with a central labour body covering such work.

3. The CPU took the position that all employees of contractors as defined by Article 3.01 (b) were included within the bargaining unit and thus should be included in the voting constituency. The IWA and the LSWU argued that the current bargaining unit in actuality did not include many employees of contractors. They asserted that the bargaining unit established by the respondent in that case and the LSWU over many years included only those employees of contractors working “from stump to roadside”. As a result of that dispute, the Board directed a pre-hearing representation vote be taken of all employees falling within a voting constituency reflecting the bargaining unit set out in the collective agreement, but ordered that the votes of certain employees be segregated and the ballot box sealed to preserve the parties’ positions. (*Great Lakes Forest Products Limited*, unreported, Board Files 1253-87-R and 1283-87-R, September 2, 1987.) In accordance with the Board’s decision, the pre-hearing representation vote was taken and the ballot box sealed.

4. In this case, it appears that the respondent is a contractor who works for Great Lakes Forest Products Limited. The employees involved are among those whose inclusion in the bargaining unit is in dispute in the Great Lakes case. Consistent with their positions in those proceedings, the CPU asserts here that the employees of the respondent should be included in the Great Lakes bargaining unit and as a result, the applications with respect to this respondent should be either postponed pending the outcome of that case or in the alternative, consolidated for hearing with that case, pursuant to section 103(3). The IWA and LSWU argue that the employees of the respondent in this matter are excluded from the bargaining unit in the Great Lakes case, that they are therefore not “affected” by the original application within the meaning of section 103(3) and that consequently the applications should be processed independently in the normal manner without reference to the Great Lakes proceedings.

5. Section 103(3) provides as follows:

(3) Notwithstanding sections 5 and 57, where an application has been made for certification of a trade union as bargaining agent for employees in a bargaining unit or for a declaration that the trade union no longer represents the employees in a bargaining unit and a final decision of the application has not been issued by the Board at the time a subsequent application for such certification or for such a declaration is made with respect to any of the employees affected by the original application, the Board may,

- (a) treat the subsequent application as having been made on the date of the making of the original application;
- (b) postpone consideration of the subsequent application until a final decision has been issued on the original application and thereafter consider the subsequent application but subject to any final decision issued by the Board on the original application; or
- (c) refuse to entertain the subsequent application.

We note that the Board has already made a determination under section 103(3) with respect to the two applications filed in the Great Lakes case, that is, that the subsequent application would be consolidated with the original application and treated as having been made on the date of the original application. What is left to be determined is whether the two applications in this file should be

consolidated with each other, and whether these proceedings as a whole should be consolidated with the Great Lakes proceedings.

6. Since all these proceedings involve prehearing votes, Section 103(3) must be read in the context of section 9 which provides as follows:

9.-(1) Upon an application for certification, the trade union may request that a pre-hearing representation vote be taken.

(2) Upon such a request being made, the Board may determine a voting constituency and, if it appears to the Board on an examination of the records of the trade union and the records of the employer that not less than 35 per cent of the employees in the voting constituency were members of the trade union at the time the application was made, the Board may direct that a representation vote be taken among the employees in the voting constituency.

(3) The Board may direct that the ballot box containing the ballots cast in a representation vote taken under subsection (2) shall be sealed and that the ballots shall not be counted until the parties have been given full opportunity to present their evidence and make their submissions.

(4) After a representation vote has been taken under subsection (2), the Board shall determine the unit of employees that is appropriate for collective bargaining and, if it is satisfied that not less than 35 per cent of the employees in such bargaining unit were members of the trade union at the time the application was made, the representation vote taken under subsection (2) has the same effect as a the representation vote taken under subsection 7(2).

The purpose of a prehearing vote is to provide a “quick vote” procedure, and as a result, it is critical that the vote not be delayed by litigation. As the Board said in *Emery Industries Limited*, [1980] OLRB Rep. Mar. 316:

5. It is axiomatic that in labour relations matters “time is of the essence”; but this is especially the case in respect of representation votes. If the trade union’s certification application, and its status as bargaining agent, are not resolved expeditiously (i.e., if we cannot engage in collective bargaining, or perform the other representational functions for which it was selected) there may be discontent amount its supporters and a possible erosion of that support. This might not only make the union’s certification more difficult, but could also complicate its collective bargaining task. The purpose of the pre-hearing, or “quick vote” procedure is to facilitate a prompt resolution of representation questions, by permitting the Board to test employee wishes as soon as possible following the application date. This avoids the potential prejudice which might arise if a representation vote had to await a decision following a formal certification hearing. Some delay is inevitable, but the pre-hearing vote procedure is a legislative attempt to remove some of the problems, and prejudice, associated with delay while, at the same time, ensuring that all of the parties will be given a full opportunity to make their submissions with respect to any matters in dispute.

To accommodate the need for expedition but also provide parties with the opportunity to have a hearing on contested issues which may arise, the scheme of section 9 contemplates the deferral of decisions on contentious matters until after the vote. Thus the Board is required only to strike a voting constituency and make an assessment with respect to whether an applicant has the *appearance* of membership support of not less than 35% before directing the vote. It is not until after the vote that the Board determines the appropriate bargaining unit and assesses the *actual* level of membership support. Where there are matters in dispute, the Board can seal the ballot box until the parties have had an opportunity to present their cases in this regard.

7. This approach has been more fully developed in the Board’s jurisprudence under section 9. While a wide variety of contested issues have arisen in cases where prehearing votes have been requested, the Board pointed out in *The International Nickel Company of Canada*, [1961] OLRB Rep. Dec. 324 that it is implicit in the use of the term “pre-hearing representation vote”

that a vote be taken before a hearing is held. As a result, such disputes will be deferred until after the vote. To protect the parties' rights to have their differences adjudicated by the Board and still maintain the expedition which is integral to the pre-hearing vote process, the Board will structure the vote and segregate ballots to try and ensure that the vote will be meaningful in any event of a dispute. The Board has handled many kinds of disputes in this fashion, including questions relating to whether an applicant has trade union status, disputes with respect to employee status and voter eligibility, and a variety of problems associated with the composition of the bargaining unit.

8. It is clear from the scheme of section 9 and the Board's jurisprudence that by directing the vote, the Board makes no assumptions about the ultimate disposition of the application. Thus, for example, should an applicant subsequently be found not to have actual membership support of at least 35%, the application will be dismissed, regardless of the fact that a vote has been held. Similarly, an applicant who subsequently fails to establish its status as a trade union will gain nothing from the pre-hearing vote. This scheme permits the vote to be taken despite the fact that a number of significant issues may be in dispute.

9. In this case, however, the issue in dispute is the exercise of the Board's discretion under section 103(3), a matter normally determined prior to the taking of the representation vote. This is possible in part because the Board's decisions under this provision are usually uncontroversial. No guidelines are set out in the Act with respect to the exercise of the discretion under section 103(3) and as a result, the Board has developed some rules of thumb in this regard. For example, where a subsequent application is filed on or before the terminal date of the original application, the Board will normally consolidate the applications under section 103(3)(a). Where a subsequent application is filed after the terminal date of the original application, the Board will usually postpone the subsequent application under section 103(3)(b) (see *The Watson Manufacturing Company of Paris Limited* [1968] OLRB Rep. Aug. 441).

10. Although the Board's decisions under section 103(3) are normally routine, it is clear that they may have significant implications for the parties. Under section 103(3)(a) if the Board consolidates a subsequent application, that subsequent application will be treated as having been made on the date of the original application. Since under section 9(2) the level of membership support is assessed as of the application date, a different application date may mean that an application may be dismissed without a vote where an applicant is no longer able to show the appearance of membership support of at least 35%. (See *Domtar Inc.*, [1987] OLRB Rep. Sept. 1132). Similarly, when the Board orders a subsequent application to be treated as having been made on the date of the original application under section 103(3), it will normally impose the terminal date of the first application on the subsequent one. This may have certain repercussions for the parties because of the role of the terminal date with respect to the filing of membership evidence and voter eligibility. As a result, the parties occasionally may wish to make representations with respect to the appropriate exercise of the Board's discretion under section 103(3). In those cases the Board will usually require the parties to make those representations by way of written submissions to be filed within a strict and short time frame.

11. In this case, however, there is a very significant dispute with respect to the Board's section 103(3) discretion which is sufficiently complex that we do not feel it would be appropriate to make the decision on the basis of the material filed to date. At the same time, it is essential that the dispute under section 103(3) not delay the taking of the vote. For these reasons, we are inclined to defer the section 103(3) decisions both as between these applications and between the two sets of proceedings until after the vote when the matter can be listed for hearing. At that time, the parties' evidence and representations with respect to the section 103(3) decisions can be

received along with those on other contested issues in the same manner that the Board would handle disputes with respect to trade union status, voter eligibility and so forth.

12. One problem with this procedure is that directing the vote and listing the matter for hearing may be thought to be such a substantial part of an application for certification requesting a prehearing vote that it could no longer be said that the Board had not in actuality made a decision with respect to how it would handle the subsequent application. In other words, if we hold a representation vote and list the matter for hearing, are we still free to decide at a later point to postpone consideration of the application or to refuse to entertain it under sections 103(3)(a) and (b), or have we already in essence decided to proceed with it?

13. In our view, it is both consistent with the Board's approach to disputes in pre-hearing representation vote cases and a tenable interpretation of section 103(3) to defer the section 103(3) decision until after the vote is held. In the unique scheme of section 9 where major decisions affecting the disposition of an application are usually made after the vote, and where the decision to direct the vote is not predicated on assumptions about the ultimate entitlement of the applicant to certification, we do not think that directing the vote or listing the matter for hearing can be said to be "considering" or "entertaining" the application. We note in this regard that there is some authority for the proposition that "consider" and "entertain" may not in some circumstances mean merely processing or contemplating an application. Rather, in certain contexts these words suggest a final adjudication or disposition of a matter on its merits: see, for example, *Carrigan v. Illinois Liquor Control Commission* (1958), 153 N.E. 2d 473 (Ill. App. Ct.) rev'd on other grounds (1960), 166 N.E. 2d 574 *Terrill v. Auchauer* 14 Ohio St. 80 (1862); *Brown v. Allen*, 73 S. Ct. 397 (1953); *Mitchell v. United States* (1961), 293 F. 2d 161 (D.C. Cir.); *Ribaudo v. Citizens National Bank of Orlando* (1958), 261 F. 2d 929 (5th Cir.). This interpretation is a sensible way of reading section 9 and section 103(3) together, and indeed, the Board itself appears to have anticipated this conclusion in *The Board of Education for the City of Hamilton* [1987] OLRB Rep. June 847. In this manner we can preserve the speed necessary to the pre-hearing vote, and at the same time protect the parties' rights with respect to a section 103(3) decision.

14. In other words, while the taking of a vote on a prehearing vote certification application may appear at first glance to be the heart of the application, in legal terms it is only one step in the handling of an application prior to a disposition on its merits. The application itself is one for certification as a bargaining agent for a group of employees, and the holding of the vote is a procedure which may well come to nothing, depending on the ultimate disposition of matters in dispute. We note that our analysis is reinforced by the Board's practice of sealing the ballot box pursuant to section 9(3) in appropriate cases. Thus in many cases the results of a vote will not even be counted unless an applicant is successful with respect to related matters in the application.

15. We emphasize that it is the unusual case where a decision under section 103(3) will be deferred. In most cases either the Board's rules of thumb or expedited written submissions will allow the Board to address this decision before the vote. However, the option of deferring its decision under section 103(3) is available in cases where the usual procedure is unsatisfactory, at least in the context of applications for certification requesting prehearing votes.

16. Obviously the deferral of the section 103(3) decision has some implications for the assessment under section 9(2) of the appearance of a level of 35% of membership support. However, the Board handles that type of problem with respect to other disputes by making its determination on the basis that the union is entitled to be assessed as of its "best position" (see *Satin Finish Hardwood Flooring (Ontario) Limited* [1984] OLRB Rep Nov. 1602). On that basis, it appears to the Board on an examination of the records of the IWA, the records of the CPU and the records

of the respondent that not less than 35% of the employees of the respondent in the voting constituency hereinafter described were members of the IWA and that not less than 35% of the employees of the respondent in the voting constituency hereinafter described were members of the CPU at the time these applications were made respectively.

17. Having regard to the agreement of the parties, the Board directs that a pre-hearing representation vote be taken of the employees of the respondent in the following voting constituency:

All employees of the respondent in the Vermillion Bay Woodlands Operations, save and except foremen, and persons above the rank of foreman.

We note the parties' agreement for the purpose of clarity that the employees in the voting constituency are the same persons in the bargaining unit currently represented by the LSWU.

18. All employees of the respondent on the agreed upon voters list who have not voluntarily terminated their employment or have not been discharged for cause as of the date the vote is taken will be eligible to vote. To allow for the different possible dispositions of this application, each and every ballot shall be segregated and the ballot box shall be sealed. Voters will be asked to indicate whether they wish to be represented by the International Woodworkers of America, the Canadian Paperworkers Union or the Lumber and Sawmill Workers Union in their relations with the respondent.

19. We note that correspondence has been received recently from the parties relating to the Great Lakes files and this matter. However, it is apparent that all parties are still not in agreement in regard to the appropriate course of action for the Board. As a result, following the taking of the vote, this matter will be listed for hearing along with the Great Lakes applications in Board files 1283-87-R and 1253-87-R. This matter is referred to the Registrar.

3062-86-R Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant v. **Laidlaw Waste Systems Ltd.**, Respondent v. Labourers International Union of North America, Oil and Gas Technicians, Service, Domestic & General Workers Union, Local 1267, Intervener

Certification - Collective Agreement - Whether collective agreement between intervener and respondent constituting a bar to applicant's certification - Board's consent not obtained for early termination of prior agreement - Two agreements covering some of the same employees contrary to Act - Second agreement cannot function as a bar

BEFORE: *Judith McCormack*, Vice-Chair, and Board Members *R. W. Pirrie* and *R. R. Montague*.

APPEARANCES: *E. del Junco*, and *D. Swait* for the applicant; no one appearing for the respondent; *M. Zigler* and *J. R. McPherson* for the intervener.

DECISION OF THE BOARD; October 14, 1987

1. This is an application for certification in which the applicant requested that a pre-hear-

ing representation vote be taken. Accordingly, the Board directed a vote by a decision dated February 27, 1987 (*Laidlaw Waste Systems Limited*, Board File 3062-86-R). At that time, the parties were in dispute with respect to the contours of the bargaining unit and the timeliness of the application. The Board described that dispute in the following terms:

The respondent and the intervener are parties to at least one and possibly two collective agreements. Both the respondent and the intervener state that they are parties to one collective agreement covering the respondent's commercial and shop and employees and dependent contractors ("the commercial-shop-dependent contractor agreement") which expires April 6, 1987. It is agreed that an application relating to those employees is timely. The respondent and intervener also state that they are parties to a collective agreement covering the respondent's residential employees ("the residential agreement") which does not expire until June 1, 1991 and contend that an application with respect to these employees would be untimely. However, the applicant takes the position that the negotiation of the residential agreement constitutes a violation of subsection 52(5) of the *Labour Relations Act* or, in the alternative, that the residential agreement is a voluntary recognition agreement and therefore an application with respect to the residential employees is timely. The residential employees were originally included as Schedule "A" of the collective agreement expiring April 6, 1987. Shop employees are provided for in Schedule "B" of that agreement and the commercial and industrial employees are provided for in Schedule "C" of that agreement. According to the intervener, when the contract was renegotiated, Schedule "A" was removed.

In light of that dispute the Board directed that the votes of the commercial, shop and dependent contractor employees, and the votes of the residential employees be kept separate and the ballot box sealed. The vote was taken as directed and subsequently this panel of the Board heard the parties' evidence and submissions with respect to the issues in dispute.

2. The respondent operates a waste disposal business which includes both residential and commercial garbage collection. It is the successor to a series of companies with which the intervener has had a continuous collective bargaining relationship. In this regard collective agreements between the intervener and a predecessor company to the respondent, Munisan Limited, were filed with the Board covering periods between April 6, 1971 - April 5, 1973 and April 6, 1973 - April 5, 1976. During the term of the latter collective agreement, Munisan Limited acquired a company formed by the amalgamation of The Basketry Limited and Ninnis Disposal Services. Prior to this acquisition, Munisan Limited had collected only residential garbage and its bargaining unit included residential collection employees, shop employees who serviced the equipment and dependent contractors. Ninnis Disposal Services and The Basketry operated commercial collection businesses, and as a result of the acquisition, Munisan Limited then had both residential collection and commercial collection components to its operation. At the time of the acquisition, the collective agreement between the intervener and Munisan Limited did not contemplate working conditions for commercial collection employees. As a result the intervener and Munisan Limited, subsequently described as Superior Sanitation Services, attached a letter dated April 1st, 1974 to the existing collective agreement setting out certain terms and conditions relating to commercial employees. The collective agreement already contained Schedules A and B setting out certain conditions for residential and shop employees respectively.

3. There was some dispute as to whether the commercial employees employed by Superior Sanitation Services as a result of the acquisition became part of the pre-existing bargaining unit of residential employees or whether they formed a separate bargaining unit. In any event, the next collective agreement between Superior Sanitation Services and the intervener for a term of two years from April 6, 1976 contains both the previous Schedules A and B with respect to residential employees and shop employees. In addition, the letter of April 1, 1974, has been replaced by a Schedule C for commercial employees. The only change of relevance in the terms incorporated into Schedule C was that a stipulation with respect to two tiers of seniority for commercial and resi-

dential employees contained in the April 1, 1974 letter was removed. The recognition clause of the collective agreement, which remained untouched when the April 1, 1974 letter was added to the previous collective agreement, was not amended under this collective agreement either, except to reflect a change in location.

4. Renewal collective agreements were signed between the intervener and Superior Sanitation Services covering terms of two years from April 6, 1978 and three years from April 6, 1980. In 1981, however, Superior Sanitation Services lost the contract with the City of Mississauga to perform residential garbage collection and laid off most of the residential employees. It appears that there was some dissension between residential and commercial employees at the time, caused by the exercise of seniority rights by the remaining residential employees to the disadvantage of commercial employees. In any event, there were no changes to the collective agreement relevant to the issues before us. The residential collection contract was awarded to another company, Robran Construction, which the intervener promptly organized. There was no dispute that the respondent succeeded Superior Sanitation Services and signed a collective agreement with the intervener for a term of two years from April 6, 1983.

5. In 1985, the intervener and the respondent sat down to negotiate a renewal of that collective agreement. In this set of negotiations, the respondent was represented by Donald Cook, the respondent's Regional Vice-President who had negotiated some 40 to 50 collective agreements. The spokesperson for the intervener was Rod McPherson, who had been the business agent and Secretary-Treasurer of the local since 1969 and who was also an experienced negotiator. Among other proposals, Mr. Cook proposed the removal of Schedule A from the collective agreement since there were no residential employees at the time, and he wished to simplify the agreement. Both parties were aware that the respondent was hoping to win back the Mississauga residential collection contract, and Mr. Cook assured Mr. McPherson that if it was successful in this regard, the respondent would sit down and negotiate with the intervener at that time. Mr. Cook told the Board that he wanted Schedule A removed because he did not want to negotiate wage rates for residential employees in a vacuum. Although Mr. McPherson had some concerns with respect to Mr. Cook's intentions, he eventually agreed to remove Schedule A because he felt the intervener was protected by the recognition clause which was left unchanged. The collective agreement flowing from those negotiations ("the 1985 Agreement") was signed on May 28, 1985 covering a term of two years from April 6, 1985. This agreement is what the intervener refers to as the commercial-shop-dependent contractors collective agreement which the parties agree is not a bar to the instant application. The recognition clause of that collective agreement reads as follows:

ARTICLE I - RECOGNITION

- 1.01 The Company recognizes the union as the sole collective bargaining agent of all employees of the Company employed at or working out of Mississauga, save and except foremen, persons above the rank of foreman, office staff and persons regularly employed for not more than twenty-four (24) hours per week.

6. In January of 1986, the respondent was awarded the contract for residential garbage collection for the City of Mississauga. The contract commenced June 1, 1986 for a five-year term. As one might imagine, this caused considerable concern on the part of Robran Construction employees, who perceived they were in danger of losing their jobs. They raised the matter with Mr. McPherson who was their business agent as well as the business agent for the respondent's employees. It was Mr. McPherson's intention to persuade the respondent to hire as many Robran Construction employees as possible. A number of arrangements were also made between the respondent and Robran Construction to facilitate the smooth transition of the Mississauga contract. For example, Robran Construction paid employees a bonus to stay at work until June 2, 1986 and

the respondent agreed to do certain work for Robran Construction if it became necessary. Officials of the respondent also attended a meeting with Robran employees to discuss the possibility of some of the latter being hired by the respondent.

7. Mr. McPherson sent a letter to the respondent titled "Notice to Bargain" [sic] in March of 1986, which appears to assert both that the intervener has bargaining rights for any residential employees of the respondent, and that the respondent is a successor employer to Robran, and thus has bargaining rights flowing from its bargaining rights for Robran employees. (We note that the parties in this matter conceded that the respondent is not a successor employer to Robran Construction within the ambit of section 63 of the *Labour Relations Act*). In April of 1986, the respondent and Mr. McPherson commenced negotiations with respect to working conditions for the residential employees to be hired by the respondent. These negotiations resulted in a collective agreement which was concluded in the last week of May, but not formally executed until June 4, 1986 ("the 1986 Agreement"). This agreement is for a term of five years and is stipulated to be effective as of June 2nd, 1986, the date on which residential employees hired by the respondent (either off the street or from the ranks of Robran employees) commenced work.

8. When he was asked why he and Mr. McPherson had negotiated a new collective agreement rather than simply reinserting a new Schedule A in the 1985 collective agreement, Mr. Cook told the Board that in view of the dissension between residential and commercial employees described earlier, it seemed better to have them in separate bargaining units. It is also obvious that the respondent was keenly aware that the 1985 collective agreement would expire during the term of the residential collection contract with the City of Mississauga with the attendant potential for labour disputes. Mr. Cook testified that the City of Mississauga had been quite "strident" in insisting on a commitment from the respondent that there would be no work stoppages during the term of the garbage collection contract. By signing a five-year collective agreement, this problem was solved from the respondent's point of view.

9. Mr. McPherson did not submit the 1986 collective agreement to any group of employees for ratification. He testified that he did not do so because he thought that the fact that he had agreed to a wage rate sixty cents per hour lower than that paid to Robran employees might create difficulties for him in this regard. When he was asked why he had agreed to the wage decrease, he told the Board that he had "the Teamsters and CUPE breathing down my neck". Later in his testimony he suggested that he wasn't particularly worried about the Teamsters. It is also evident that Mr. McPherson felt his bargaining position was weak and that the *quid pro quo* for a collective agreement that was something less than optimal was that some of the Robran employees would be hired by the respondent. The alternative as far as Mr. McPherson was concerned was for the intervener to take its chances on a successor rights application under the *Labour Relations Act*. Mr. McPherson also agreed to a four-month probationary period for employees, and testified that it was his intention to wait out the probationary period and then try to improve the collective agreement. While the 1986 collective agreement provides for a wage re-opener after three years, no mechanism is provided for resolving any dispute which might arise at that point. This collective agreement is asserted by the intervener as a bar to the instant application to the extent that the application affects residential employees. The scope clause of the agreement is as follows:

Article 2 Recognition

- 2.01 The company recognizes the union as the sole and exclusive collective bargaining agent for all employees at the Mississauga residential division, save and except foreman, persons above the rank of foreman, sales staff, office staff, students employed during June, July and August and persons regularly employed for not more than twenty-four (24) hours per week.

10. At the time the 1986 agreement was entered into, no changes were made to the scope clause of the 1985 collective agreement. Of the eighty employees who commenced work on residential garbage collection on June 2, 1986, some thirteen or fourteen were previously Robran Construction employees. It is clear from the evidence before us and conceded by the intervener that a minority of employees were members of the intervener on that date. Evidence was given that more employees than were actually required were hired, and that the respondent engaged in a sifting process over the next four months of the probationary period.

11. On the basis of these facts, both counsel made a number of able and thoughtful arguments. Counsel for the applicant argued that residential employees were covered by the 1985 collective agreement until May of 1986 when the 1986 collective agreement was entered into. He asserted that by entering into the latter agreement, the respondent and the intervener terminated the 1985 collective agreement vis-a-vis residential employees and that that termination was an early termination which fell within the ambit of section 52(3). Because the intervener and the respondent did not have the Board's consent to such early termination, the 1985 contract could not be terminated. Consequently, entering into the 1986 collective agreement meant that there were two collective agreements covering some of the same employees, contrary to section 49 of the Labour Relations Act. As a result, it was argued that the second collective agreement is null and void and cannot be raised as a bar to this application.

12. Alternatively, counsel for the applicant took the position that when the intervener and the respondent deleted Schedule A from the collective agreement in 1985, the intervener abandoned the bargaining rights for residential employees. When the 1986 collective agreement was signed, it was thus a collective agreement entered into pursuant to a form of voluntary recognition. As a result, it was argued, under section 60 it cannot be a bar to the application because the intervener was not entitled to represent employees in light of the small percentage of residential employees who were members at the time. In the further alternative, the applicant was of the view that the timing of the 1986 collective agreement, the fact that there were no residential employees at the time it was concluded, the nature of its provisions and the sequence of events demonstrates that the intervener had employer support from the respondent. As a result, it was argued that the 1986 collective agreement is deemed not to be a collective agreement by virtue of section 48.

13. Counsel for the intervener argued that the intervener did not abandon bargaining rights for residential employees in 1985 when Schedule A was deleted. Rather, the parties simply agreed to separate employees into two bargaining units either at that point or when the 1986 collective agreement was signed. There was also some suggestion that there were two bargaining units for these employees from the time when Munisan Limited acquired Ninnis Disposal Services and The Basketry. It is permissible, counsel argued, for parties to a collective agreement to change the contours of their bargaining unit by amending their recognition clause during the life of a collective agreement. The fact that there were no provisions with respect to residential employees from 1985 until 1986 simply reflects the fact that there were no residential employees. The bargaining rights remained intact in a manner analogous to situations where there is a temporary plant shutdown. Thus the fact that the intervener did not have majority support from employees is irrelevant, as section 60 does not apply to this case.

14. Counsel for the intervener took the position that Mr. McPherson was simply being realistic in his assessment of his bargaining position when he approached the 1986 negotiations and that he attempted to get the best deal that he could in the circumstances. The sequence of events demonstrates not employer support, but rather the respective bargaining strength of the parties and the efforts by Mr. McPherson to protect the job security of Robran Construction employees. Counsel argued that we should approach the matter as simply an issue of determining the most

appropriate bargaining unit. In this case, the incumbent intervener represents employees in two bargaining units and that bargaining unit structure is considered *prima facie* appropriate on a displacement application. In the alternative, the intervener's position was that the two sets of employees do not share a community of interest and should be in separate bargaining units for that reason as well.

15. Turning first to the history of the bargaining unit structure, we are not convinced that two bargaining units were created when Munisan Limited acquired The Basketry and Ninnis Disposal Services. There is no mention of this in the April 1st, 1974 letter attached to the collective agreement, nor were any amendments made to the scope clause of that agreement which might support this suggestion. The letter of April 1st, 1974 does provide for two tiers of seniority, but this apparently results from the fact that Ninnis Disposal Service employees had been previously represented by an employee association, and does not in itself mean that separate bargaining units were created. Indeed, it might just as easily be said that the two tier provision was only necessary because employees were in one unit. While there were many differences in working conditions as well, this fact is less significant given that there were also differences between conditions for residential employees, shop employees and dependent contractors who were indisputably in the same bargaining unit at that point. In short, it appears that the new commercial employees were simply folded into the existing bargaining unit although certain provisions with respect to working conditions were made for them in the letter of April 1st, 1974. (We note that even if the intervener was correct that two bargaining units were created at this point, one bargaining unit would have included commercial employees with the other containing residential employees, shop employees and dependent contractors. This does not support the bargaining unit configuration urged upon us by the intervener in which residential employees would be in a separate bargaining unit and commercial employees, shop employees and dependent contractors would be clustered together.)

16. We are reinforced in our view of events by the subsequent collective agreement in which the letter of April 1st, 1974 was replaced by Schedule C. At that point there were three distinct groups of employees covered by separate schedules and there is no particular reason indicated either on the face of the collective agreement or on the evidence before us to suppose that one group, the commercial employees, were in a separate bargaining unit from the others. This is also true for the subsequent collective agreements up to and including the one covering the years 1983 - 1985. We conclude that all employees reflected on the face of the recognition clause remained in one bargaining unit at least until the 1985 round of negotiations.

17. Did the removal of Schedule A in that round serve to create two bargaining units at that time? On balance we think not. While the evidence is not unequivocal, both Mr. Cook and Mr. McPherson eventually agreed in cross-examination that in removing Schedule A, neither intended to change the structure of the bargaining unit. As noted before, there was no change to the scope of the recognition clause. We conclude that the parties removed Schedule A simply because there were no residential employees working at the time. Mr. Cook did not want to negotiate wage rates for non-existent employees and was concerned that the respondent be left with some flexibility in this regard when it came to tender for the Mississauga contract. Mr. McPherson was prepared to go along with this proposal, keeping in mind Mr. Cook's assurances that the respondent would negotiate with the intervener if residential employees were subsequently hired. In addition, it is clear that Mr. McPherson was relying on the fact that there was no change to the recognition clause to provide protection for the intervener's bargaining rights.

18. The notice to bargain letter in March of 1986 is a problematic document. While it might suggest that a separate bargaining unit was created previously for residential employees for which Mr. McPherson was now giving notice to bargain, a review of the text of the letter indicates other-

wise. There are two main elements: an assertion of the bargaining rights for residential employees of the respondent and an implicit claim of successor rights for Robran employees. We find that although the letter is titled "Notice to Bargain" [sic], in fact it can be more accurately characterized as initiating a general discussion with respect to the consequences of the Mississauga contract being awarded to the respondent, rather than a formal notice to bargain in the more precise sense that phrase is usually used in labour relations. As a result, we find that the letter tells us little, if anything, about the bargaining unit structure. We conclude that the removal of Schedule A did not remove residential employees from the ambit of the 1985 collective agreement nor create a separate bargaining unit for them.

19. For similar reasons, we do not find that the intervener abandoned its bargaining rights for residential employees at that time. Neither the removal of Schedule A in itself in the circumstances described, nor the evidence of Messrs. Cook and McPherson supports this proposition. Indeed, Mr. McPherson's inquiries and Mr. Cook's assurances with respect to future negotiations for residential employees suggest that both parties intended to preserve the intervener's bargaining rights and took some pains to say so, despite the removal of Schedule A. The interval between the making of the 1985 collective agreement and the notice to bargain letter sent by Mr. McPherson in March of 1986 was less than a year, and it is clear that Mr. McPherson promptly asserted those bargaining rights as soon as it became apparent that residential employees would be hired. The hiatus in the exercise of bargaining rights in these circumstances does not reflect an abandonment of those rights by the intervener. As a result, we conclude that at the time the intervener sat down to negotiate the 1986 collective agreement in May of that year, residential employees were already covered by the collective agreement entered into in May of 1985.

20. What was the effect of entering into the new collective agreement? The applicant asserts that it represented a form of voluntary recognition and thus section 60 of the Labour Relations Act applies. Section 60 provides as follows:

(1) Where an employer and a trade union that has not been certified as the bargaining agent for a bargaining unit of employees of the employer enter into a collective agreement, or a recognition agreement as provided for in subsection 16(3), the Board may, upon the application of any employee in the bargaining unit or of a trade union representing any employee in the bargaining unit, during the first year of the period of time that the first collective agreement between them is in operation or, if no collective agreement has been entered into, within one year from the signing of such recognition agreement, declare that the trade union was not, at the time the agreement was entered into, entitled to represent the employees in the bargaining unit.

(2) Before disposing of an application under subsection (1), the Board may make such inquiry, require the production of such evidence and the doing of such things, or hold such representation votes, as it considers appropriate.

(3) On an application under subsection (1), the onus of establishing that the trade union was entitled to represent the employees in the bargaining unit at the time the agreement was entered into rests on the parties to the agreement.

(4) Upon the Board making a declaration under subsection (1), the trade union forthwith ceases to represent the employees in the defined bargaining unit in the recognition agreement or collective agreement and any collective agreement in operation between the trade union and the employer ceases to operate forthwith in respect of the employees affected by the application.

It is evident that section 60 is only triggered by voluntary recognition of one form or another. But the 1986 collective agreement could not represent such voluntary recognition since the intervener had not abandoned its pre-existing bargaining rights. The most that could be said is that by executing the 1986 agreement, the respondent was acknowledging bargaining rights already held by the

intervener, conduct which in our view is insufficient to attract the application of section 60. As a result, we find the applicant's arguments in this regard unpersuasive.

21. We now turn to the applicant's arguments with respect section 52. That section reads as follows:

52.-(1) If a collective agreement does not provide for its term of operations or provides for its operation for an unspecified term or for a term of less than one year, it shall be deemed to provide for its operation for a term of one year from the date that it commenced to operate.

(2) Notwithstanding subsection (1), the parties may, in a collective agreement or otherwise and before or after the collective agreement has ceased to operate, agree to continue the operation of the collective agreement or any of its provisions for a period of less than one year while they are bargaining for its renewal with or without modifications or for a new agreement, but such continued operation does not bar an application for certification or for a declaration that the trade union no longer represents the employees in the bargaining unit and the continuation of the collective agreement may be terminated by either party upon thirty days notice to the other party.

(3) A collective agreement shall not be terminated by the parties before it ceases to operate in accordance with its provisions of this Act without the consent of the Board on the joint application of the parties.

(4) Notwithstanding anything in this section, where an employer joins an employers' organization that is a party to a collective agreement with a trade union or council of trade unions and he agrees with the trade union or council of trade unions to be bound by the collective agreement between the trade union or council of trade unions and the employers' organization, the agreement ceases to be binding upon the employer and the trade union or council of trade unions at the same time as the agreement between the employers' organization and the trade union or council of trade unions ceases to be binding.

(5) Nothing in this section prevents the revision by mutual consent of the parties at any time of any provision of a collective agreement other than a provision relating to its term of operation.

The Board has set out the purpose underlying section 52 as one of insuring the maintenance of an open period in which employees can change their bargaining agent or forego union representation altogether. In *Continental Group of Canada*, [1980] OLRB Rep. Oct. 1381, the Board said as follows:

At first glance, it might seem odd that the parties to a collective agreement cannot by mutual consent alter its term of operation; however, the reason for this restriction becomes apparent when one considers that the agreement prescribes not only the terms and conditions of employment, but also the time when employees are permitted to challenge their union's position as bargaining agent. Sections 5 and 49 of the Act provide that applications for certification or termination can only be made during the last two months of the collective agreement's operation - that is, during the so-called "open period". An alteration of the term of the collective agreement, therefore, can effect the rights of third parties. If a union and employer could alter the agreement's term of operation, the "open period" could be eliminated or postponed, and with it, the right of employees to challenge their union's status as bargaining agent. To avoid this possibility, the statute provides that the term of the collective agreement must be fixed, specific, and not subject to variation without the consent of the Labour Relations Board.

Before granting its consent to an early termination of an outstanding collective agreement, the Board seeks to assure itself that such action will not prejudice the rights of interested individuals or trade unions who may be planning to challenge the incumbent's bargaining rights during the open period.

22. In this case we find that by entering into the 1986 collective agreement, the parties to it intended to create two bargaining units and to ensure that the 1985 collective agreement no longer

applied to residential employees. In effect, the parties purported to terminate the application of the 1985 agreement in regard to those employees. In *United Forming Limited* [1969] OLRB Rep. Jan. 1073, the Board noted that early termination of a collective agreement with respect to some employees but not others falls within section 52(3):

After due consideration we have come to the conclusion that the applicants are entitled to relief under the terms of section 39 [now section 52] of the *Labour Relations Act*. If the applicants were to mutually agree to amend the recognition clause of the agreement dated November 4, 1968 by excluding therefrom reinforcing rodmen, construction labourers and carpenters and carpenters' apprentices the parties would at all events, for those classifications, be revising a provision of the agreement relating to its term of operation within the meaning of those words in subsection 5 of section 39 [now section 52]. If they were so to act they would bring that agreement to an end insofar as those classifications are concerned. That being the case, we are of the opinion that it is within the power of the Board under subsection 3 of section 39 [now section 52] to consent to such a revision or termination on the joint application of the parties.

23. We note in this case that the residential employees make up a majority of the bargaining unit. Given the purpose of section 52(3), we find that an analysis in which it applies to the purported termination of a collective agreement with respect to a large portion of a bargaining unit continues to have much to recommend it. If it is of "vital importance" that the open period be preserved (*The National Cash Register Company of Canada Limited*, [1967] OLRB Rep. April 90), it is difficult to see why it is of any less importance if only one group of employees is involved. Moreover, if the parties were permitted to terminate their collective agreement prematurely with respect to a particular group of employees without triggering section 52(3), they might be able to entirely eliminate the open period by arranging for a series of leapfrogging collective agreements relating to different groups of employees. It is true that the intervener and the respondent did not explicitly change the term of the 1985 agreement. However, that was essentially the effect of their conduct on residential employees. To interpret section 52(3) as applying only when the parties sit down and physically change the wording of the duration clause of their collective agreement would allow them to do indirectly what they cannot do directly.

24. In our view it makes no difference that the residential employees were not yet hired at the time the intervener and the respondent purported to terminate the 1985 collective agreement with respect to them. If the intervener and the respondent had not entered into the 1986 agreement, the employees hired on June 2, 1986 would have fallen under the 1985 collective agreement and they would have had an opportunity to challenge the status of their bargaining agent in 1987 when that collective agreement expired. In any event, the opportunity to challenge bargaining rights is synchronized with the cycle of those rights rather than geared directly to the presence or absence of employees. In this case, it is evident that the very mischief to which section 52(3) is directed is present. The respondent wished to stabilize its labour relations by locking the intervener into a collective agreement running for the period of the Mississauga contract. By this means, it is apparent that it hoped to avoid the potential for labour disputes that might arise from either the expiry of the collective agreement or the open period. The intervener agreed to the 1986 collective agreement at least in part because the presence of other unions in the wings made a long collective agreement and the avoidance of the open period desirable. As a result, the intentions of the parties and the effect on the residential employees highlight one of the very problems section 52(3) is designed to address, the elimination of the open period. We find that the intervener and the respondent contravened section 52(3) by terminating the 1985 collective agreement with respect to residential employees without the consent of the Board.

25. We now turn to the effect of such a finding. 52(3) is framed in mandatory terms, that is, "a collective agreement *shall* not be terminated before it ceases to operate ... without the consent of the Board" (emphasis added). In our view, the strength of the syntax employed suggests that

without the consent of the Board, a collective agreement cannot be terminated as described. Since there is no question that the Board did not consent in this case, (and there was no *ex post facto* request in this regard) we conclude that the 1985 collective agreement continues to operate with respect to all employees in accordance with its recognition clause. This result is consistent with both a literal interpretation of section 52(3) and its purpose. Thus the 1986 collective agreement entered into by the intervener and the respondent was the second collective agreement between them which purported to cover residential employees. This is not a tenable state of affairs under the *Labour Relations Act*. Section 49 provides as follows:

49. There shall be only one collective agreement at a time between a trade union or council of trade unions and an employer or employers' organization with respect to the employees in the bargaining unit defined in the collective agreement.

26. Reading section 52 and section 49 together in the context of this case leads us to the conclusion that at the very least, the 1986 agreement could not function as a bar to an application for certification during the term of the 1985 agreement. To hold otherwise would be to render both section 52(3) and section 49 meaningless in circumstances that clearly fall within the ambit of their respective rationales. As a result of our conclusion in this regard, we do not find it necessary to address the applicant's argument with respect to section 48.

27. We now turn to the intervener's submission that in any event, the Board should find that the appropriate bargaining unit configuration for the purposes of this application should be two units. In *Milltronics Limited*, [1980] OLRB Rep. Jan. 56 the Board set out its approach to the issue of the appropriate bargaining unit on displacement applications:

On an application for certification the Board is required to determine the unit of employees which is appropriate for collective bargaining. Where one trade union is seeking to displace another, however, the established bargaining structure is *prima facie* appropriate - particularly if it has been established by the parties themselves through collective bargaining, and continued through the years over several collective agreements. Indeed, what better evidence of "appropriateness" could there be than a pre-existing bargaining structure which the parties have developed themselves and have adapted to their own bargaining circumstances. The Board has been reluctant to fragment an established bargaining unit structure or to "carve out" groups of employees from such a structure. The Board will generally find the appropriate bargaining unit to be that which the incumbent presently represents; although, of course, in appropriate circumstances, a larger unit may also be appropriate and could be granted without raising any concern about fragmentation. Usually, however, a "raiding union" must "take" what the incumbent union has.

28. In this case, however, there is some question as to whether the presumption of appropriateness should apply to the single unit or the two unit configuration. On the one hand, the two unit structure is a product of the 1986 agreement which we are not prepared to recognize as a bar to the current proceedings. On the other hand, we have deliberately avoided characterizing that agreement as entirely null and void. In particular, it was not the division of employees into two bargaining units in itself that ran afoul of sections 52(3) and 49. Rather, it was the attempt to carve a large group of employees out of an existing collective agreement and sign a new agreement for a longer term at least in part for the purpose of eliminating the open period which contravened the Act. Had the parties created two units but kept them both under the 1985 collective agreement and made no other changes to its duration, we are not satisfied that either section 52(3) or section 49 would have been offended in the circumstances of this case. We note that section 52(5) specifically provides that section 52 does not prevent parties from revising collective agreement provisions which do not relate to the term of operation. There was no suggestion by the parties here that the bargaining unit division was in itself a device to defeat a displacement application because of the demographics of membership support.

29. The Board has been accorded a broad discretion under section 6 of the Act to shape units which are appropriate for collective bargaining, whether or not a particular bargaining unit is the *most* appropriate. (See *University of Windsor* [1983] OLRB Rep. Mar. 478). After carefully weighing the principles enunciated in the Board's jurisprudence in the context of this case, we conclude that the two bargaining unit structure is appropriate.

30. We therefore find the following to constitute units of employees appropriate for collective bargaining:

Bargaining Unit #1

All employees of the Respondent employed at or working out of Mississauga, Ontario save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and residential division employees.

Bargaining Unit #2

All employees of the Respondent's residential division employed at or working out of Mississauga, Ontario save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.

31. The Board is satisfied that less than thirty-five per cent of the employees of the respondent in Bargaining Unit #1 were members of the applicant at the time the application was made. As a result, that part of the application which relates to Bargaining Unit #1 is dismissed. However, the Board is also satisfied that not less than thirty-five per cent of the employees of the respondent in Bargaining Unit #2 were members of the applicant at the time the application was made. As a result, we direct that the ballot box be unsealed and the ballots of employees in Bargaining Unit #2 be counted.

32. This matter is referred to the Registrar.

3063-86-U Betty Jean Luno, Complainant v. Canadian Union of Public Employees, Local 1019, and The Lambton County Board of Education, Respondents

Settlement - Unfair Labour Practice - Complainant signing minutes of settlement providing for withdrawal of complaint upon cash payment - Later claiming that settlement not legal binding because she was not represented by counsel and because of the consequences of the agreement - Party not allowed to repudiate a settlement because it falls short of what legal counsel may have obtained - Complaint withdrawn in accordance with the minutes of settlement

BEFORE: *Robert D. Howe*, Vice-Chair, and Board Members *R. M. Sloan* and *B. L. Armstrong*.

DECISION OF THE BOARD; October 9, 1987

1. The name of the first respondent is amended to "Canadian Union of Public Employees, Local 1019".
2. This is a complaint under section 89 of the *Labour Relations Act* in which the complainant alleges that she has been dealt with by the respondents contrary to the provisions of sections 68, 70, and 80 of the Act.
3. The complaint was filed with the Board on February 10, 1987. On February 13, 1987, the Board authorized Peter Gallus, a Labour Relations Officer, to enquire into the complaint and to endeavour to effect a settlement, pursuant to section 89(1) and (2) of the Act.
4. Pursuant to that authorization, Mr. Gallus convened a meeting of the parties in Sarnia on March 26, 1987, at which the complainant and the respondent trade union entered into the following Minutes of Settlement:

Minutes of Settlement

The parties agree to settle this matter and it is hereby settled as follows:

- 1) The Union acknowledges that due to the unusual circumstances involved in the complainant's dismissal some of its actions did not meet the level of conduct required by section 68 of the Ontario Labour Relations Act.
- 2) The Union a [sic] agrees to pay to the complainant the sum of \$2500. dollars by the 5th day of May, 1987, subject to article (3) of this agreement.
- 3) This memorandum of settlement is subject to certification by the membership of CUPE, local 1019 and the Executive agrees to recommend acceptance of this memorandum of settlement to its membership in a timely manner.
- 4) The complainant, upon receipt of the sum set out in paragraph (2) herein, agrees to withdraw Board file 3063-86-U and further agrees that she will not take or initiate any further actions, complaints or other proceedings against the Union, its members and Paul Senay that may arise from or out of the facts contained in Board file 3063-86-U.
- 5) The parties hereby agree to adjourn this matter sine die, subject to paragraph (4) herein.
- 6) The terms of this memorandum of settlement shall not be released to any party outside of this agreement, prior to this agreements [sic] ratification pursuant to paragraph (3) herein, without the express written consent of the parties involved.

Dated this 26th day of March, 1987 at Sarnia, Ontario.

(signed) "Betty J. Luno"
Betty Jean Luno

(signed) "Donald Whiting"
CUPE Local 1019
DONALD WHITING

(signed) "Joe Conely"
witness
JOE CONELY

(signed) "Eva J. Fraser"
CUPE Local 1019
EVA J. FRASER

(signed) "Edna Cooper"
witness
Edna Cooper

5. In a letter dated July 17, 1987, Shaun R. Hennessy, the Director of the Legal and Legis-

lative Department of the Canadian Union of Public Employees, advised the Board that the respondent trade union had complied with its obligations under paragraph 2 of the Minutes of Settlement by tendering a cheque, in the amount agreed to, directly to the complainant on May 2, 1987. That letter also contained the following information and request:

I am instructed that Ms. Luno has cashed the cheque on May 5, 1987. Since Ms. Luno has not complied with her obligations under the memorandum of settlement, Local 1019, therefore, takes the position that this matter has been finalized and requests that the Board direct the complainant to comply with the terms of the settlement or to dismiss the complaint.

A photocopy of a certified cheque dated May 2, 1987, in the amount of \$2,500.00, payable to Betty Jean Luno, accompanied that letter.

6. Copies of that letter and cheque were forwarded by V. R. Robeson, the Board's Registrar, to the complainant, to David Stoesser (a lawyer who was retained by the complainant after she entered into the Minutes of Settlement), to the Lambton County Board of Education, and to that respondent's counsel, along with a request that their comments, if any, with respect thereto be received in the Registrar's office on or before August 31, 1987. In a letter dated August 18, 1987 (which was received by the Board on August 24, 1987), Mr. Stoesser acknowledged receipt of that material and advised the Board as follows:

I have referred this matter to my colleague, Mr. Peter Westfall, Barrister & Solicitor, 1778 Churchill Road, Sarnia, Ontario, N7T 7H3, and I have directed your letter to him. Under the circumstances, I trust you will allow Mr. Westfall a little time from August 31st, 1987 to respond to your query.

7. On August 27, 1987, the Registrar acknowledged receipt of that letter and forwarded copies of it to the other parties for their comments, if any, on or before September 8, 1987. On September 16, 1987, J. A. MacDonald, the Board's Deputy Registrar wrote to Mr. Stoesser as follows, with copies to all of the parties and their respective representatives (including Mr. Westfall):

As indicated by V.R. Robeson in her letter of August 27, 1987, copies of your letter of August 18, 1987 were forwarded to the other interested parties herein for their immediate comments. No such comments have been received. Under the circumstances, the date by which comments, if any, regarding the letter dated July 17, 1987 and the cancelled cheque, referred to in V.R. Robeson's letter to you dated August 17, 1987, are to be received in this office is hereby extended to September 28, 1987.

8. In a letter dated September 18, 1987, Mr. Westfall wrote to the Deputy Registrar as follows:

I acknowledge receipt of your letter dated September 16th, 1987. I enclose a copy of my letter to the Ontario Labour Relations Board dated September 2nd, 1987. To restate out position once again, it is my opinion that the agreement between the Union and Betty Jean Luno is not legally binding on her because she was not represented by counsel and because of the drastic outcome of the agreement.

She is still unemployed and we are pursuing this matter on the grounds of sexual discrimination, sexual harassment, through the Ontario Human Rights Board [sic] and until the matter of her loss of employment is resolved it is not our intention to release the Union from their responsibility in the matter.

Would you please acknowledge by return mail that you have received our correspondence.

Mr. Westfall's letter dated September 2, 1987 which was enclosed with that letter (and which had not previously been received by the Board) reads as follows:

I am now acting on behalf of Betty J. Luno. I have received your letter dated August 17, 1987.

I have some difficulties in the settlement arrangement between Mrs. Luno and her Union. She was unrepresented by counsel during the settlement discussions. The failure to properly represent her resulted in her termination of employment without a proper review through the Grievance procedure.

The serious consequences of the Union's failure would not appear to be reflected in the amount of the settlement.

On September 30, 1987, the Registrar acknowledged receipt of Mr. Westfall's letter of September 18 and the letter dated September 2, 1987 which was enclosed with it, and forwarded copies of those two letters to the respondents and their representatives.

9. As indicated above, the complainant signed Minutes of Settlement by which she agreed, among other things, to withdraw this complaint upon receipt of \$2,500 from the respondent trade union. Although the complainant has received that sum, she is now taking the position, through her lawyer, that she is not bound by that written settlement because she was not represented by counsel at the time of the settlement, and because the counsel whom she subsequently retained is of the opinion that the consequences of the respondent trade union's contravention of section 68 of the Act are not adequately reflected in the amount of the settlement.

10. Under section 10 of the *Statutory Powers Procedure Act*, R.S.O. 1980, c. 484, a party to proceedings such as the instant case may be represented by counsel or an agent. However, there is no *requirement* under that legislation, nor under the *Labour Relations Act*, that a party be so represented; a party is at liberty to refrain from retaining counsel (or from arranging to be represented by an agent) and to represent herself/himself. If such a party enters into minutes of settlement, the fact that s/he was not represented by counsel at the time of the settlement does not negate the binding effect of the settlement. Nor is the settlement vitiated by the fact that the complainant agreed to withdraw her complaint upon receipt of the sum of \$2,500. The purpose of section 89 is to secure a prompt, final, and binding resolution of unfair labour practice complaints. The Act expressly recognizes and endorses the settlement of such complaints without a formal Board hearing and decision. The provisions of section 89 are intended to facilitate settlements. Under section 89(7), where the matter complained of in a section 89 complaint has been settled, and the terms of the settlement have been put in writing and signed by the parties or their representatives, the settlement is binding upon the parties who have agreed to the settlement. Indeed, section 89(7) makes noncompliance with a written settlement a breach of the Act. Each year, trade unions, employees, and employers file thousands of applications or complaints before the Board. A large majority of them are settled. Sometimes the settlement favours a trade union or an employer. Other times it favours an employee. Usually it represents a compromise under which the parties neither achieve as much nor risk as much as they would by proceeding to a hearing before the Board. The parties generally arrive at a settlement in order to avoid the cost and uncertainties of litigation. The orderly resolution of Board proceedings and the efficacy of the settlement process would be gravely prejudiced if, having signed minutes of settlement, a party could afterwards repudiate the settlement because it fell short of what a legal adviser subsequently retained by that party felt to be achievable through the complaint. (See, generally, *Brantwood Manor Nursing Homes Limited*, [1984] OLRB Rep. Mar. 415.)

11. For the foregoing reasons, this complaint is withdrawn in accordance with the provisions of the Minutes of Settlement set forth above.

1584-87-R Windsor Mouldmakers Union Local 1680 C.L.C., Applicant v. Laval Tool & Mould Ltd., Respondent v. Group of Employees, Objectors

Certification - Trade Union Status - Whether local chartered by CLC is a trade union - When charter granted, contractual relationship necessary was created - No evidence that employees confused about what they were joining - Applicant found to be a trade union - Vote ordered

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *J. A. Rundle* and *R. R. Montague*.

APPEARANCES: *Ralph Ortlieb*, *Richard Koval* and *Raymond Murray* for the applicant; *Patrick F. Milloy*, *James H. Menzies* and *Larry Azzopard* for the respondent; *Theodore Crljenica* and *Robert Taylor* for the objectors.

DECISION OF THE BOARD; October 26, 1987

1. This is an application for certification. As the applicant has not been so found in any previous proceeding, it is obliged in this one to establish that it is a "trade union" within the meaning of clause 1(1)(p) of the *Labour Relations Act* ("the Act"), which provides that:

1.-(1) In this Act,

- (p) "trade union" means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency.

2. Ralph Murray is a long time employee of the Canadian Labour Congress ("the CLC"). He was involved in organizing the applicant in the early 1970's for the purpose of taking over from an existing employee association the role of collective bargaining agent for employees of another Windsor employer, International Tools Limited. A charter was granted by the CLC to ten named individuals on March 27, 1974, constituting them "Windsor Mouldmakers' Union Local No. 1860". Mr. Murray testified that this charter was granted pursuant to Article XVI of the then constitution of the CLC, which provided (and still provides) in part:

Section 1. Subject to Article III, Section 2, and other applicable provisions of this Constitution, the Congress may issue charters to local unions and organizing committees.

Section 2. The Executive Council of the Congress shall issue rules governing the conduct, activities, affairs, finances and property of organizing committees and directly chartered local unions, and governing the suspension, expulsion and termination of such organizations....

While they are not before us, Mr. Murray testified without challenge or contradiction that the general rules for chartered locals which are contemplated by this Article did exist at that time. They are referred to in one of the documents before us as "Bylaws Governing Chartered Local Unions". Those Bylaws governed the affairs of the applicant from the time it came into existence until May 29, 1975, when CLC executive approval brought into effect a revised set of bylaws which had been formulated by the applicant's membership. Articles 1 and 2 of those Bylaws provide as follows:

ARTICLE 1

NAME

This organization shall be known as, Windsor Mouldmakers Union Local 1680 situated at Windsor, Ontario, having been duly chartered by the Canadian Labour Congress.

ARTICLE 2

PREAMBLE

The general purpose of the Union are outlined in the declaration of principles and constitution of the said Canadian Labour Congress, it's [sic] particular object is to protect and advance the interests of its' [sic] members to secure collectively the highest possible wages, the shortest possible working hours and the best possible working conditions; to induce its' [sic] members to develop a higher standard of skill, to cultivate higher feelings of friendship and to advance the moral, intellectual and social well-being of the members. Furthermore, it shall be the duty of every member of the Union to advocate the principles of organization and advance the cause of labour in general.

These Bylaws have not since been amended. Having regard to Article 1 of the Bylaws, the name "Windsor (Ont.) Mouldmakers Union No. 1680" in the title of this proceeding has been amended to read "Windsor Mouldmakers Union Local 1680 C.L.C.".

3. Mr. Murray was not present at the election of the applicant's current executive in November 1985. Richard Koval, the applicant's current President, was present at that meeting. He testified that the offices contemplated by the applicant's Bylaws were filled by election at that meeting.

4. Counsel for the respondent argues that the applicant is not a trade union. He acknowledges that this Board has concluded, in at least three reported decisions, that locals chartered by the CLC are trade unions as defined by the Act: *Cochrane-Dunlop Hardware Limited* (1963), 63 CLLC ¶16,268; *Economical Mutual Insurance Company*, [1972] OLRB Rep. Feb. 176; *Canadian Underwriters' Association*, [1973] OLRB Rep. May 267. He says those decisions came to that conclusion by a process of reasoning analogous to that by which locals of parent unions have been found to be unions: the parent's constitution is the constitution of the local and the parent is a trade union - therefore, the local is a trade union. The error in this reasoning, he argues, springs from the fact that the CLC is an organization of unions, not an organization of employees; consequently, the CLC's constitution is not the constitution of a trade union and the applicant's having that constitution cannot make it a trade union.

5. Counsel's argument mischaracterizes the Board's analysis in those earlier decisions. The Board has not said that the constitution of the CLC is the constitution of the chartered local but, rather, that the constitution of the CLC provides or provides for the constitution of the local. In *Cochrane-Dunlop Hardware Ltd.*, *supra*, after noting that the CLC appeared not to be an "organization of employees" within the meaning of clause 1(1)(p) (then clause 1(1)(j)) of the Act, the Board observed:

...However, unlike the case of a newly formed employees' association, when a local is chartered by the C.L.C. it is chartered pursuant to an existing constitution, that is, the constitution of the C.L.C. (see Article XIV). Moreover the provisions of Article XIV together with the By-laws governing chartered local unions made pursuant to Article XIV, provide a formal constitution for any directly chartered local the moment the charter number is assigned or the charter itself issued. This is in complete contrast to the circumstances surrounding the formation of an independent association where there is often no constitution of any kind and no idea of what is going to be contained in a constitution at the time membership cards are signed and dues paid.

(See also *Canadian Underwriters Association*, *supra*, at paragraph 9.)

6. Counsel for the respondent and counsel for the objecting employees both submit that the applicant cannot be found to be a trade union in the absence of evidence that its members adopted or ratified whatever may be said to have been or become its constitution when its charter

was issued. They submit that this follows from the Board's decision in *Associated Hebrew Schools of Toronto*, [1978] OLRB Rep. Sept. 797. In a similar vein, counsel for the objecting employees contends that the applicant must show that the people who applied for the charter knew what provisions would govern them as members of the applicant once that charter was issued.

7. The language of clause 1(1)(p) of the Act, particularly the words "organization", "formed" and "purposes", contemplates a formal structure which may be (and in this jurisdiction usually is) that of an unincorporated association of individuals. The objects and purposes of such an association and the rules governing its affairs are set out in one or more documents which may be called the "constitution", "bylaws" or "rules" of the association. Those who join the association agree to be bound by the provisions of those constitutional documents, which constitute a contract between each member and all of the others: *Orchard v. Tunny* (1957), 8 D.L.R. (2d) 273 (S.C.C.); *Bimson v. Johnson et al.*, [1957] O.R. 519 (Ont. H.C.), aff'd [1958] P.W.N. 217; and, *Astgen v. Smith*, (1967) 7 D.L.R. (3d) 657 (Ont. C.A.).

8. In *Associated Hebrew Schools of Toronto*, *supra*, the Board noted that:

10. Once a trade union has come into existence it is a relatively simple matter for others to become members of the organization and thereby enter into a contractual relationship with the existing members. When a new member joins, however, he does so on the basis of a pre-existing constitution. He knows (or at least should know) that it is a trade union which he is joining, that he is entering into a contractual relationship with the other members of the union and that the terms of that relationship are as spelt out in the union's constitution. The more difficult procedure to accomplish is for a group of employees to create a trade union where none has existed before. This process must involve not only the settlement of the terms of a constitution for the union, but also the taking of steps which make it clear that the individuals involved have actually entered into a contractual relationship one with another on the basis of the terms set forth in the constitution.

The Board went on to observe that:

11. The Board has in a number of cases indicated a series of steps which will generally be sufficient to insure that a trade union has been brought into existence. See, for example, *Local 199 U.A.W. Building Corporation* [1977] OLRB Rep. July 472.

These steps may be summarized as follows:

1. A constitution should be drafted setting out, among other things, the purpose of the organization (which must include the regulation of labour relations) and the procedure for electing officers and calling meetings.
2. The constitution should be placed before a meeting of employees for their approval either as originally drafted or as amended at the meeting.
3. 3. The employees attending the meeting should be admitted into membership. In this regard it is well to keep in mind section 1(1)(j) of the Act which defines a union member to include a person who has applied for membership in the union and on his own behalf paid to the union at least \$1.00 in respect of initiation fees or monthly dues.
4. The constitution should be ratified by a vote of the members.
5. Officers should be elected pursuant to the constitution.

Performance of this series of steps has no purpose other than to ensure that persons said to be members of an applicant for certification have indeed entered into a contractual relationship each with the others on the terms set out in the purported constitution of the applicant and, so, have

brought a formal organization into existence. This was the focus of the Board's concern in *Associated Hebrew Schools of Toronto, supra*, as is evident from the analysis which followed its recital of the often quoted "series of steps":

As indicated above, the great majority of the membership applications filed in these proceedings are dated prior to the adoption of the constitution. Thus it cannot reasonably be said that the employees at the time that they signed these applications were agreeing to become contractually bound one to another in that the terms of such a contractual relationship simply did not exist.... A constitution was adopted at the meeting on December 14, 1977. However, at that meeting no one joined the applicant or re-adopted membership applications executed earlier. In short, while the people present at the meeting seem to have decided upon the terms of a constitution for the applicant, there is no evidence that they individually adopted the terms of the constitution as the basis of a contractual relationship one with another. In these circumstances there could not have been a ratification of the constitution by actual members of the applicant.

13. We do not believe that the Board should be unduly technical in determining whether a trade union has come into existence, and in this regard would refer to the *Local 199 U.A.W. Building Corporation* case referred to above. In the instant case, however, because of the time lapse involved between the signing of the membership applications and the adopting of the constitution as well as the circumstances surrounding the receipts issued at the time that employees did sign the membership applications, we simply are unable to conclude that on December 14, 1977 employees entered into a contractual relationship one with another so as to create an "organization of employees". It follows from this that the thirteen applications for membership dated in May of 1978 would have been with respect to a non-existent organization. We are, therefore, not satisfied that the applicant is a trade union within the meaning of section 1(1)(n) of the *Labour Relations Act*.

9. The steps referred to in paragraph 11 of the decision in *Associated Hebrew Schools of Toronto, supra*, are not conditions precedent to the creation of a trade union. Any other behaviour capable of creating the necessary contractual relationship among member employees will be equally effective: *Niagara Veteran Taxi*, [1979] OLRB Rep. Sept. 889. As the Board noted in the passage we have quoted from *Cochrane-Dunlop Hardware Ltd., supra*, there is a substantial distinction between the chartering of a local trade union pursuant to the constitution of an existing organization and the formation of a trade union by the sort of procedure addressed in paragraph 11 of the decision in *Associated Hebrew Schools of Toronto, supra*. Article XVI of the CLC constitution says that chartered locals will have a constitution dictated by the CLC's Executive Council. On the evidence before us, the terms of that standard local constitution were fixed and ascertainable when the ten individuals named in the applicant's charter made application for it. Those ten founding members must be taken to have known the consequences of their application and to have thereby agreed to be bound by that local constitution. It is not necessary for the applicant to demonstrate that those individuals actually knew the terms of the standard local constitution, any more than it is necessary to show that an applicant for membership in an existing trade union has actual knowledge of the contents of that trade union's constitution. The contractual relationship necessary to the existence of the local was created among the applicants for the charter when that application was granted; no further ratification or confirmation was necessary to that end.

10. Counsel for the objecting employees contended that the applicant organization could not be a trade union because its purposes do not include the regulation of relations between employees and employers. In our view, Article 2 of the applicant's Bylaws quite adequately satisfies that element of the statutory definition. Counsel argued in the alternative that the applicant could not be a trade union because its members do not have full control over whether its objects are changed; the CLC, he submits, could eliminate the applicant's collective bargaining purpose. Not only is that unlikely, but it can be debated whether the applicant's objects could be changed without at least a two-thirds vote of the applicant's membership, having regard to Article 27 of the applicant's Bylaws. In any event, the question is whether the applicant is a trade union now, not

whether it might cease to be one in the future. Clause 1(1)(p) does not require that a trade union's members have exclusive control over the amendment of its constitution, and it would be improper to impose a requirement not supported by the language of the Act: *Re CSAO National Inc. and Oakville Trafalgar Memorial Hospital Association*, [1972] 2 O.R. 498 (Ont. C.A.).

11. Counsel for the respondent and counsel for the objecting employees argued that some confusion may have resulted from the fact that notice of this application described the applicant as "Windsor (Ont.) Mouldmakers Union No. 1680" and the membership evidence consists of applications for membership in "Canadian Labour Congress Chartered Local Union No. 1680", while the applicant's actual name is "Windsor Mouldmakers Union Local 1680 C.L.C.". Neither offered evidence of actual confusion; both argued that it was for the applicant to satisfy the Board that there has not been confusion. We would be concerned if employees of the respondent were confused about which union was being referred to in applications for membership or in the Board's notices of these proceedings. We have no reason to suppose, however, that there is another Mouldmaker's Union or CLC Local or other union with which the applicant might have been confused in the minds of employees. (See *Food Corp. Limited*, [1983] OLRB Rep. May 636, at paragraph 15.) Accordingly, we find that the employees of the respondent whose applications for membership and acknowledgments of payment have been filed are members of the applicant. The applicant is, accordingly, an organization of employees formed for purposes which include the regulation of relations between employees and employers - a "trade union" within the meaning of clause 1(1)(p) of the *Labour Relations Act*.

12. Having regard to the agreement of the parties, we find that:

all employees of the respondent in Maidstone Township, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period,

constitute a unit of employees appropriate for collective bargaining.

13. Having regard to the evidence before us, we find that more than fifty-five per cent of the employees in that unit on the date of the application were members of the applicant as of September 21, 1987, the terminal date fixed for this application and the date (the "assessment date") which the Board determines under clause 103(2)(j) of the Act to be the time for ascertaining membership under section 7(1) of the Act.

14. The objecting employees have filed documentary evidence of opposition by employees to certification of the applicant as at the assessment date. Some of the employees who signed those statements had earlier become members of the applicant. Members who have *not* signed such statements constitute not more than fifty-five per cent of the employees in the unit on the application date. In those circumstances, the Board would direct a representation vote in the exercise of its discretion under subsection 7(2) of the Act if it were satisfied that the statements of opposition represent voluntary expressions of the wishes of the persons who signed them: *Unlimited Textures Company Limited*, [1984] OLRB Rep. Jan. 138. Against the possibility that the applicant might be found to be a trade union, at the conclusion of our hearing on October 2, 1987, a hearing was scheduled for October 26 and 27, 1987 for the purpose of an inquiry into the voluntariness of the statements of opposition. The applicant has since advised the Board (by telegram dated October 13, 1987) that it acknowledges the voluntariness of the statements of opposition and requests that the Board direct a representation vote. This makes the scheduled hearing unnecessary, and it has been cancelled by the Registrar.

15. Accordingly, we direct that a representation vote be conducted among employees in the aforesaid bargaining unit. Persons employed in that unit as of October 13, 1987, who are so employed on the date the vote is taken will be eligible to vote. Voters will be asked whether or not they wish to be represented by the applicant in their employment relations with the respondent.

16. The matter is referred to the Registrar.

1430-87-R International Woodworkers of America, Applicant v. Lecours Lumber Company Limited, Respondent

Bargaining Unit - Certification - Pre-Hearing Vote - Panel not adopting the bargaining unit description agreed to by the applicant and respondent as the voting constituency - Use of the phrase "save and except persons in bargaining units for which any trade union held bargaining rights as of ..." inappropriate - Incumbent had not agreed to this bargaining unit description which deviates from that in the incumbent's collective agreement - Incumbent's bargaining unit description adopted minus language referring to employees of contractors engaged by the respondent - Vote ordered

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *J. A. Rundle* and *J. Redshaw*

DECISION OF THE BOARD; September 28, 1987, as amended October 13, 1987

1. This is an application for certification in which the applicant has requested that a pre-hearing representation vote.

2. The respondent and the Lumber and Sawmill Workers Union Local 2995, of the United Brotherhood of Carpenters and Joiners of America (hereafter referred to as "the incumbent") are said to have been parties to a collective agreement signed August 11, 1987, with effect from September 1, 1984 to August 31, 1987. The respondent is described in the collective agreement as "Lecours Lumber Company Limited", and that is how it was named in the application. In its reply, the respondent says its name is "Lecours Lumber Co. Limited". It does not appear from the Labour Relations Officer's report on his meeting with the parties that this difference was discussed or the correct name of the respondent resolved at that meeting. Accordingly, that is an issue which will have to remain outstanding. In the meantime, we will describe the respondent by the name in which it contracted with the incumbent trade union.

3. Although duly notified of this application, the incumbent trade union has not filed a formal intervention, nor did it attend the meeting with the Labour Relations Officer. Equally, it has not advised the Board that it has abandoned its bargaining rights with respect to employees affected by this application. Accordingly, this is a displacement application and account must be taken of the existence and scope of the incumbent's bargaining rights. Article 3.01 of the aforesaid collective agreement provides:

3.01 (a) The Company recognizes the Union as the sole collective bargaining agency for all of its employees who are engaged in woods operations on the limits, and on the work sites of the Company. For purposes of this Article, Company employees shall be all those employed in the job classifications set out in the Wage Schedule attached to and forming a part of this agree-

ment, including those who are employed on job classifications which may be established and become part of the attached wage schedule during the term of this agreement.

3.01 (b) The employees of contractors engaged by the Company on the limits and work sites of the Company shall be considered employees within the terms of this agreement; save and except the employees of contractors and/or the contractors who are engaged to perform occasional special services not commonly performed by employees covered by the terms of this agreement, employees of contractors where such contractors are engaged for the purpose of erecting structures.

The report of the Labour Relations Officer indicates that employees of the respondent at its saw-mill are covered by a separate contract with an unidentified trade union. That trade union may be the incumbent.

4. The applicant initially took the position that the appropriate bargaining unit in this application would be described as:

all employees of the respondent, Lecours Lumber Company Limited (Woods), Calstock, Ontario, save and except foremen, persons above the rank of foremen, office and sales staff.

The respondent's initial position was that the unit should be described as:

Employees engaged in woods operations on the limits and on the work sites of the Company.

The Labour Relations Officer's report indicates that the applicant and respondent agreed on the following description:

all employees of the respondent in Calstock, save and except foremen, persons above the rank of foreman, scalers, office and sales staff, and persons in bargaining units for which the trade union held bargaining rights as of August 26, 1987.

5. Section 9 of the *Labour Relations Act* provides:

9.-(1) Upon an application for certification, the trade union may request that a pre-hearing representation vote be taken.

(2) Upon such a request being made, the Board may determine a voting constituency and, if it appears to the Board on an examination of the records of the trade union and the records of the employer that not less than 35 per cent of the employees in the voting constituency were members of the trade union at the time the application was made, the Board may direct that a representation vote be taken among the employees in the voting constituency.

(3) The Board may direct that the ballot box containing the ballots cast in a representation vote taken under subsection (2) shall be sealed and that the ballots shall not be counted until the parties have been given full opportunity to present their evidence and make their submissions.

(4) After a representation vote has been taken under subsection (2), the Board shall determine the unit of employees that is appropriate for collective bargaining and, if it is satisfied that not less than 35 per cent of the employees in such bargaining unit were members of the trade union at the time the application was made, the representation vote taken under subsection (2) has the same effect as a the representation vote taken under subsection 7(2).

Our function at this stage is to deal with the matters referred to in subsection 9(2) of the Act. The first such matter is determination of the voting constituency. When the parties agree on a description of the appropriate bargaining unit, the Board ordinarily adopts that description as the description of the voting constituency. It may not do so, however, if there is some possibility that the panel which determines the appropriate bargaining unit after the vote under subsection 9(4) may

not accept that agreement. As the Board observed in *University of Ottawa*, [1986] OLRB Rep. Mar. 353 at paragraph 4:

4. It is not our function at this stage to determine the composition of the appropriate bargaining unit. As appears from subsection 9(4) of the *Labour Relations Act*, that determination is only made after the vote is conducted, after all interested persons have had the opportunity of a hearing before the Board. Nevertheless, as the Board observed in *Scarborough General Hospital*, [1984] OLRB Rep. Dec. 1765 at paragraph 5:

...Although the appropriate bargaining unit is not determined by the Board until after a pre-hearing vote has been conducted, the likely outcome of that determination is a factor considered in striking the voting constituency or constituencies at the pre-vote stage, because a pre-hearing vote is of little use unless one can reconstruct from it a vote of the employees in the unit ultimately found appropriate by the Board.

While the scope of the parties' agreements over the description of the appropriate bargaining unit ordinarily establishes the range of likely determinations of that issue, that is not always so. The parties' agreement on a bargaining unit description does not relieve the Board of its statutory obligation to determine whether the agreed upon unit is appropriate. Parties' agreements on what would constitute an appropriate unit for the purposes of collective bargaining between them are ordinarily accorded considerable deference because they are presumed to reflect their special knowledge of the matters relevant to that determination. Such agreements are not determinative, however, and in certain circumstances the Board may decide not to accept the parties' agreement: *Tamco Ltd.*, [1974] OLRB Rep. Nov. 764; *North York Board of Education*, [1982] OLRB Rep. June 918; *St. Joseph's Hospital, Sarnia*, [1983] OLRB Rep. June 984. Accordingly, when determining a voting constituency, the Board must be sensitive to the possibility that language agreed to by the applicant and respondent may not be accepted by the panel which makes the post-vote determination required by subsection 9(4) of the Act.

We do not think it appropriate to adopt the bargaining unit description agreed to by the applicant and respondent as the voting constituency, because we doubt whether it would be accepted by the panel which makes the post-vote determination required by subsection 9(4).

6. The first problem with the agreed description is with the use of the phrase "save and except ... persons in bargaining units for which any trade union held bargaining rights as of August 26, 1987." This was apparently intended to effect the exclusion of sawmill workers from the unit of woodcutters sought by the applicant. The problem is that woodcutters are also persons in a bargaining unit for which a trade union (the incumbent) held bargaining rights as of August 26, 1987, so the very employees for whom the applicant seeks certification would not fall within the agreed description.

7. The second problem with the parties' description also results from the fact that this is a displacement application. As the Board noted in *Scarborough General Hospital*, [1984] OLRB Rep. Dec. 1765:

5. Where there is a request for a pre-hearing representation vote on a displacement application, the Board's standard practice is to require the applicant to accept as a voting constituency the bargaining unit represented by the incumbent union, see *Toronto East General and Orthopaedic Hospital, Inc.*, [1981] OLRB Rep. Feb. 225 at paragraph 9. This is because the Board's general practice in displacement applications is to view the established bargaining structure as *prima facie* appropriate. Although the appropriate bargaining unit is not determined by the Board until after a pre-hearing vote has been conducted, the likely outcome of that determination is a factor considered in striking the voting constituency or constituencies at the pre-vote stage, because a pre-hearing vote is of little use unless one can reconstruct from it a vote of the employees in the unit ultimately found appropriate by the Board. The question we are obliged to determine at this stage is whether, against this background, it would be inappropriate to adopt the parties' agreement on the voting constituency description.

In that case, the Board concluded that it is open to the parties to a displacement application to agree upon a voting constituency and bargaining unit description which differs in language from the unit description in the latest collective agreement between the incumbent trade union and respondent employer. At paragraph 8, of the decision in that case, the Board noted:

... The important qualification is that the new description must apply to all the employees covered by the existing description, and to no others. It should also remain as faithful as possible to the original description's potential scope, it should be consistent with the principles applied by the Board when the description of units arises as a matter of first impression, and it should not introduce any new ambiguity or uncertainty.

Implicit in the Board's approach is that there be full agreement on the proposed deviation from the description of the incumbent's agreement. In the absence of the incumbent's agreement, the Board would not ordinarily describe the voting constituency otherwise than in the language by which the bargaining unit represented by the incumbent is currently defined. The incumbent has not agreed to the bargaining unit description on which the applicant and respondent have agreed.

8. For these reasons, the starting point for defining the voting constituency in this matter is the bargaining unit defined in the incumbent's agreement with the respondent. We would not wish to adopt all of the language in the article quoted in paragraph 3, however, particularly the language in Article 3.01(b) referring to employees of contractors engaged by the respondent. This application can only affect persons who are employees of the respondent within the meaning of the *Labour Relations Act*. It is possible, of course, that a person nominally employed by one entity is nevertheless the employee of another as a matter of law. We have no way of knowing whether that is or is not so with respect to employees of the respondent's contractors. If it is, then the words "employees of the respondent" will encompass them. If it is not, then, in the absence of a declaration under subsection 1(4), it is hard to see how they could fall within any bargaining unit of employees of the respondent for which this Board would have jurisdiction to certify the applicant in this application.

9. Accordingly, we determine that the voting constituency in this matter shall consist of:

all employees of the respondent engaged in woods operations on the limits
and on the worksites of the respondent.

For purposes of clarity, the word "employees" as used in this voting constituency description includes all those employed in job classifications set out in the wage schedule attached to and forming part of the September 1, 1984 to August 31, 1987 collective agreement between the respondent and the Lumber and Sawmill Workers' Union Local 2995, of the United Brotherhood of Carpenters and Joiners of America, including those who are employed in job classifications, if any, which have been established and become part of the aforesaid wage schedule during the term of that agreement.

10. It appears to the Board, on an examination of the records of the applicant and the records of the respondent, that not less than thirty-five per cent of the employees of the respondent in the aforesaid voting constituency were members of the applicant at the time the application was made.

11. Accordingly, the Board directs that a pre-hearing representation vote be taken of the employees of the respondent in the aforesaid voting constituency. All persons employed in the voting constituency on September 10, 1987 who are so employed on the date of the vote will be eligible to vote. Ballots cast by foremen, persons above the rank of foreman, scalers or office and sales

staff shall be segregated and not counted. Persons normally employed by contractors engaged by the respondent may cast ballots, but their ballots shall be segregated and not counted.

12. Voters will be asked to indicate whether they wish to be represented by the applicant or the incumbent in their labour relations with the respondent.

13. The matter is referred to the Registrar.

0211-87-R Labourers' International Union of North America, Local 506, Applicant v. **Menkes Developments Inc.**, Respondent v. Labourers' International Union of North America, Local 183, Intervener

Certification - Membership Evidence - Practice and Procedure - Earlier decision varied - Respondent not permitted to add further name to employee list when list already amended three times - Incomplete dates on membership cards cured by *viva voce* evidence - Possible ambiguity in documentary evidence concerning whether application one for membership in local or international not fatal because, as a whole, the evidence points unequivocally to membership in the applicant - Certificates issuing

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *I. M. Stamp* and *H. Kobryn*.

APPEARANCES: *Mike Mihajlovic* and *Bernard Fishbein* for the applicant; *Richard J. Charney* and *John Formusa* for the respondent; *Jules Bloch*, *Allison Hudgins* and *R. Lotito* for the intervener.

DECISION OF THE BOARD; September 18, 1987

1. By letters dated June 29, 1987 and July 2, 1987 respectively, the applicant and intervener sought reconsideration of part of the Board's decision dated June 22, 1987 in this matter. At the hearing on July 16, 1987, the Board ruled orally that, having regard to the representations of the parties and because the scope of the intervener's bargaining rights under its collective agreement with the Metropolitan Toronto Apartment Builders Association is not a matter which is relevant to the Board's considerations in this proceeding, it found it appropriate, pursuant to its powers under section 106(1) of the *Labour Relations Act*, to vary its June 22, 1987 decision (since reported at [1987] OLRB Rep. June 881) by:

- (a) deleting the word "do" in the third last sentence of paragraph 10 and substituting therefore the words "is it entirely clear that", and
- (b) deleting the second last sentence in paragraph 11, namely "whatever the extent of the bargaining rights held by Local 183 with respect to the respondent, they do not encompass all of the non-ICI sectors of the construction industry."

The Board's decision dated June 22, 1987 was otherwise affirmed.

2. The Board then dealt with the balance of the matters in issue between the parties and ruled orally, without reasons, that certificates would issue to the applicant in accordance with sec-

tion 144(2) of the Act. This oral ruling was confirmed in a written decision dated July 21, 1987. The Board's reasons now follow.

3. With respect to the applicant's challenges to the list of employees, the parties were able to agree that Rodrigues Therriault's name should be removed from the list and the applicant withdrew its challenge with respect to John Richardson. It was also confirmed that Terry McEvoy's name should be on the list. The Board then heard the evidence and representations of the parties with respect to whether or not the respondent would be permitted to add Dale Ince to the list of employees, notwithstanding the Board's oral ruling at the hearing on June 5, 1987 that the respondent would not be permitted to add further names to the list subsequent thereto.

4. Dale Ince was employed at one of the respondent's job sites on the date this application was made. The respondent obtained his services through Industrial Overload, which, its name suggests, is in the business of supplying temporary staff to employers who require it. Mr. Ince was never on the respondent's payroll. The respondent paid Industrial Overload for his services. The respondent has no knowledge of the amount Industrial Overload paid to Mr. Ince for the work he did on the respondent's job site. John Formusa, a solicitor employed with the respondent as its general counsel, was responsible for collecting the information relating to the respondent's reply and list of employees in consultation with Mr. Charney, who was retained by the respondent to represent it in these proceedings. Mr. Formusa relied on Ernie McBride, a Vice-President of the respondent, and various other of the respondent's staff to collect the information for him. As set out in paragraph 14 of the Board's earlier decision with respect to this application, the respondent had some difficulty in determining what name should be included on the list and it sought, and was permitted, to amend that list three times before it sought to add Mr. Ince's name. It is clear, however, that all of the relevant information with respect to Mr. Ince was in the possession and control of the respondent at all material times.

5. The Board's Rules and Procedures are structured in a manner designed to limit the ability of any party to gerrymander the list of employees or the structure of the bargaining unit. The respondent to an application for certification is required to provide the Board with a complete list of the employees in the bargaining unit proposed by the trade union on the date the application was made. The list of employees must be filed by the terminal date fixed for the application. A list of employees cannot be filed late, or amended once filed, without leave of the Board. As a matter of practice, the Board will generally permit a respondent to either file this list of employees, or amend a list that it did file to reflect new information not previously available or to correct errors that could not reasonably have been discovered beforehand as late as the outset of the hearing (*Santa Marie Foods*, [1981] OLRB Rep. Nov. 1618; *Corecon Developments*, [1985] OLRB Rep. May 657).

6. In the circumstances of this case, including its previous oral ruling with respect to additions to the list by the respondent, the Board was not persuaded that, absent the consent of the applicant, the respondent ought to be permitted to further amend its list of employees by adding Mr. Ince's name. Even if Mr. Ince was an employee of the respondent, which is open to question, the respondent first filed, and subsequently amended three times, a list of employees based on information wholly within its sole possession and power, including the information with respect to Mr. Ince which it repeatedly overlooked. In our view, the respondent had already been given substantial amount of latitude with respect to its list of employees and permitted to amend its list yet again would make a mockery of the Board's rules with respect to such lists. Accordingly, the Board ruled orally that it would not permit the respondent to add Dale Ince to the list of employees in this proceeding.

7. Upon receiving the Board's ruling, counsel for the applicant submitted that it was in a position to be certified without the need for a representation vote regardless of the outcome of its remaining challenges. An examination of the documentary evidence of membership filed by the applicant in support of its application revealed that it had filed 16 combination applications for membership and receipts and 1 certificate of membership. The applicant also filed the required Form 80, Declaration Concerning Membership Evidence, Construction Industry which is duly completed and attests to the sufficiency and regularity of the membership evidence filed. Of the 17 pieces of documentary evidence filed, 12 coincide with the names that presently appear on the list of employees. Of these 12, 10 are satisfactory in their form and content and meets the requirements of the Act. The other 2, both combination applications for membership and receipts, contain incomplete dates. One such card shows a date of "20, 1987" and the other shows a date of "April 21". In accordance with its usual practice (see *P.R.C. Chemical Corporation of Canada Ltd.* [1980] OLRB Rep. May 749 and *Gallant Painting* [1987] OLRB Rep. Mar. 367), and the Board permitted the applicant to call evidence to cure this deficiency. On the basis of that evidence, the Board was satisfied that the first card was collected on April 20, 1987 and the second on April 21, 1987.

8. In the course of the evidence with respect to the dates on which the 2 aforesaid cards were collected, a blank combination application for membership and receipt card of the kind submitted to the Board as documentary evidence of membership was marked as an exhibit. That card is in the following form:

APPLICATION FOR MEMBERSHIP
In the
LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA

LOCAL 506 Date

Name

Address

Town, City

Birth

Employed by

I hereby make application to become a member of the Labourers' International Union of North America. In doing so, I, of my own free will and accord, hereby authorize the Labourers' International Union of North America or its representatives, or officers to act for me as collective bargaining agent in all matters pertaining to rates of wages, hours of work and other conditions of employment.

Signature of
Applicant

SIGN HERE

\$ Initiation Fee received by

SIGNATURE

I confirm payment of Initiation Fee

SIGNATURE OF APPLICANT

RECEIPT

Date

Labourers' International Union of N.A. — Local 506

Received from

\$ as payment of Initiation Fee.

SIGNATURE

9. Counsel for the respondent asserted that the cards filed by the applicant are ambiguous and that the employees could reasonably be expected to have been confused, particularly in the circumstances of this application where the respondent already has a collective bargaining relationship with respect to certain of its employees with the Labourers' International Union of North America, Local 183. The respondent submitted that the Board should exercise its discretion under section 7(2) of the *Labour Relations Act* to direct the taking of a representation vote even if the documentary evidence filed by the applicant showed that more than fifty-five per cent of the employees of the respondent in the bargaining unit on the date the application was made were members of the applicant during the material times.

10. Evidence of membership in an International Union is not generally accepted by the Board as evidence of membership in a local thereof. (See for example *Bernardin of Canada Limited*, [1975] OLRB Rep. Oct. 737). However, membership in a local is accepted as evidence of membership in the parent international (see for example *The Explorer Inns, Limited*, [1978] OLRB Rep. June 541). In every case, however, the Board will examine the material facts and an apparent ambiguity in the documentary evidence will not be fatal provided that, as a whole, it points unequivocally to membership in the applicant (see for example *Wallaceburg Hydro Electric Systems*, [1975] OLRB Rep. Oct. 783; *Union Electric Supply Co. Limited*, [1983] OLRB Rep. May 829; *General Motors of Canada Limited*, unreported decision of the Board dated December 28, 1984 in Board File No. 2418-84-R). It was the Board's view that the documentary evidence filed in support of this application is sufficiently unambiguous for the Board to be satisfied that it relates to the applicant and that no reasonable employee would have been confused by it. The cards are clearly applications for membership. Further, both the application and receipt portions refer clearly to the applicant. The cards are clearly applications for membership in both the Labourers' International Union of North America and its Local 506. Accordingly, the Board ruled orally that the applicant's documentary evidence of membership is a reliable indication that the employees to whom it relates were members of the applicant.

11. The Board's ruling with respect to Mr. Ince obviated the need to deal with the applicant's remaining challenges to the list. By virtue of the ruling, the list contained between 15 and 21 names, depending on the success of the challenges. The applicant's documentary evidence of membership is such that even if it was not successful in any of its challenges, 12 out of the 21 employees of the respondent who would then be in the bargaining unit at the time the application was made, were members of the applicant on May 7, 1987, the terminal date fixed for the application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act* to be the time for ascertaining membership under section 7(1) of the Act. We were satisfied that where, as here, the description of the bargaining unit has been settled and the Board can say with certainty that more than fifty-five per cent of the employees in the unit on the application date were members of the applicant at the relevant time, the Board can and should certify the applicant, notwithstanding the existence of some dispute with respect to the list of employees that would not affect the result (*Robin Hood Multifood Inc.*, [1985] OLRB Rep. July 1159).

12. Accordingly, for the reasons given herein, certificates issued to the applicant as aforesaid.

0250-87-R; 3291-86-R; 3457-86-R United Brotherhood of Carpenters and Joiners of America, Local 27, Applicant v. **Mollenhauer Limited**, Respondent v. Labourers' International Union of North America, Local 183, Intervener #1 v. Metropolitan Toronto Apartment Builders Association, Intervener #2; United Brotherhood of Carpenters and Joiners of America, Local 27, Applicant v. Ellis-Don Limited, Respondent v. Labourers' International Union of North America, Local 183, Intervener #1 v. The Form Work Council of Ontario, Intervener #2 v. Metropolitan Toronto Apartment Builders Association, Intervener #3; United Brotherhood of Carpenters and Joiners of America, Local 27, Applicant v. Milne & Nicholls Ltd., Respondent v. Labourers' International Union of North America, Local 183, Intervener #1 v. Metropolitan Toronto Apartment Builders Association, Intervener #2

Certification - Evidence - Reconsideration - Balancing of interests requiring production of documents - Documents that are arguably relevant must be produced - Decision to produce documents confirmed

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *D. A. MacDonald* and *P. Grasso*.

APPEARANCES: *Douglas J. Wray* for the applicant; *W. Thornton* for the respondents; *A. M. Minsky* for intervener #1 and The Form Work Council of Ontario; *Doug Gilbert* for the Metropolitan Toronto Apartment Builders Association.

DECISION OF THE BOARD; October 1, 1987

1. The Metropolitan Toronto Apartment Builders Association (the "MTABA") and the Labourers' International Union of North America, Local 183, ("Local 183") both sought clarification of the Board's decision dated September 8, 1987 in this matter at the hearing held on September 10, 1987. Local 183 also sought reconsideration, pursuant to section 106(1) of the *Labour Relations Act*, of part of the September 8, 1987 decision.

2. We note that Mr. Reilly has not yet been actually served with the summons referred to in the September 8, 1987 decision as stated in paragraph 1 thereof. Rather, the parties had requested the Board to rule with respect to the summons on the basis that the applicant intended to have it served. In addition, having regard to the circumstances and the submissions of the parties, the Board directed that Mr. Green bring the documents he has been directed to produce to the hearing scheduled for September 21, 1987. Mr. Reilly was directed to bring the documents he has been directed to produce, as varied herein, to the hearing scheduled for November 9, 1987 if he is properly served with the summons prior thereto. The Board notes that counsel for the MTABA and counsel for Local 183 both undertook to make the documents to be produced available to counsel for the applicant prior to the scheduled appearances of Messrs. Green and Reilly respectively.

3. With respect to the clarifications sought, the Board confirmed that the directions contained in paragraph 9 of the Board's decision of September 8, 1987 were as broad as they seemed. The broad net that has been cast by the Board's directions results from the manner in which the proceeding had developed and the issues before the Board have been defined.

4. On consent of the applicant, subparagraph (d) on page 12 of the Board's September 8,

1987 decision was varied by deleting therefrom the words "Local 183 and the Residential Framing Contractors Association of Metropolitan Toronto and Vicinity Inc., and between the Ontario Form Work Association and the Form Work Council of Ontario" in lines 7 to 12 thereof.

5. Other than as already indicated, the Board denied Local 183 request that it reconsider or vary its September 8, 1987 decision and affirmed the same.

6. Counsel for Local 183 submitted that all of subparagraph (d) on page 12 of the Board's September 8, 1987 decision should be deleted because it was based on an apparent misunderstanding of Local 183's position in this proceeding. Counsel indicated that the Toronto Housing Labour Bureau, the Residential Framing and the Form Work Collective Agreements have only been provided to the Board, subject to proof, for the sake of completeness and form no part of Local 183's case. Accordingly, submitted counsel, the assumptions expressed in paragraph 7 and the conclusions set out in paragraph 8 of the September 8, 1987 are not correct. Even if the Board has, to some extent, misconstrued Local 183's position, we were not persuaded that our conclusions with respect to what documents ought to be produced by Local 183 were incorrect. In our view, the manner in which the issues have heretofore been defined and the proceeding has developed are such that it cannot be said that documents relating to the scope of Local 183's collective agreement with the Toronto Housing Labour Bureau are not arguably relevant. We appreciate Local 183's concerns with respect to the use of such documents for purposes other than these proceedings. In that regard, we adopt the views expressed at paragraph 19 of the Board's decision in *Shaw Almax Industries Limited*, [1984] OLRB Rep. Apr. 659. In our view, a balancing of the interests involved requires production. We also appreciate that it may require a great deal of work to comply with the Board's directions. However, that results from the nature of the case and is of no assistance in determining whether or not documents should be produced. At this stage, documents that are arguably relevant to the issues before the Board must be produced. Ultimately, the Board will determine the relevance of, and weight to be given to, all of the evidence adduced.

7. The Board directed that the hearings continue as scheduled on September 21, November 9, 10, 12, 13, December 8 and 10, 1987.

0699-87-U Labourers' International Union of North America, Local 506, Applicant v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 and Chris Thurrott and Niagara Mechanical Contractors Limited, Respondents

Remedies - Strike - Employer told that plumbers would not work until labourer removed from work site - Board finding threat of illegal strike - Request for order directing employer to cease and desist from refusing to employ the labourer denied - Employer free to decide who should perform the disputed work

BEFORE: *Ken Petryshen*, Vice-Chair.

DECISION OF THE BOARD; October 16, 1987

1. This is an application for relief under section 135 of the *Labour Relations Act*.

2. At the conclusion of the hearing and after consulting with the parties with respect to the urgency of this matter, the Board reserved its decision. Two days later, the Board issued a written decision containing the following directions:

That the respondent trade union, the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46, its respective agents, officers, officials, servants, employees, representatives, substitutes and all other persons acting for and on their behalf refrain from:

- (i) threatening Niagara Mechanical Contractors Limited, or any of its respective officers, officials, agents, representatives or employees or any other person, firm or corporation, with an unlawful strike of members of the respondent Local 46 employed by Niagara Mechanical Contractors Limited engaged at the "Procter and Gamble" project at 4711 Yonge Street in Metropolitan Toronto, with the view, purpose, motive or intention of preventing members of the applicant employed by Niagara Mechanical Contractors Limited at the "Procter and Gamble" project at 4711 Yonge Street in Metropolitan Toronto, from performing the work in dispute assigned to them;
- (ii) authorizing, counselling, procuring, supporting, or encouraging an unlawful strike of members of the respondent Local 46 employed by Niagara Mechanical Contractors Limited engaged at the "Procter and Gamble" project at 4711 Yonge Street in Metropolitan Toronto, with a view, purpose, motive or intention of preventing members of the applicant employed by Niagara Mechanical Contractors Limited at the "Procter and Gamble" project at 4711 Yonge Street in Metropolitan Toronto, from performing the work in dispute assigned to them;
- (iii) interfering with the members of the applicant employed by Niagara Mechanical Contractors Limited at the "Procter and Gamble" project at 4711 Yonge Street in Metropolitan Toronto;
- (iv) preventing members of the applicant employed by Niagara Mechanical Contractors Limited at the "Procter and Gamble" project at 4711 Yonge Street in Metropolitan Toronto, from performing work in dispute assigned to them.

The Board noted in its decision that it would not make an order directing Niagara Mechanical Contractors Limited to cease and desist from refusing to employ a member or members of the applicant to perform the disputed work. The reasons for the Board's decision are as follows.

3. Counsel for the Labourers' International Union of North America, Local 506 (hereinafter referred to as "Local 506") called D. Lapointe, R. Voigt and C. Principato as witnesses. Counsel for Chris Thurrott and the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 (hereinafter referred to as "Local 46") called C. Thurrott as a witness. In making the factual determinations, the Board has considered all of the evidence, the credibility of the witnesses and the submissions of the parties.

4. There is little dispute on the facts between the parties. Niagara Mechanical Contractors Limited (hereinafter referred to as "NMCL") obtained a mechanical subcontract for an office building project located at 4711 Yonge Street in Metropolitan Toronto. The project is commonly referred to as the "Procter and Gamble" project since that company will be the building's prime tenant. NMCL is bound by the Plumbers provincial collective agreement and, at the relevant time, employed approximately twenty members of Local 46 at the project.

5. NMCL is also bound by the Labourers provincial collective agreement. On Friday, May 29, 1987, someone from the head office of NMCL contacted Local 506 and requested that it refer

one of its members to the “Procter and Gamble” project. On that same day, Local 506 referred Lapointe to the project. Lapointe reported for work on the project on Monday, June 1, 1987 and was assigned by the general foreman to do patching around pipes and sleeves. During the course of that day, he was often asked by other workers if he was a plumber. Lapointe asked the Local 46 steward, J. Christie, what the problem was. Christie’s response included the comment that Lapointe should not be doing the work he was assigned and that he, Christie, had notified the Local 46 business agent. On June 2, 1987, Lapointe was assigned to do chipping of concrete blocks.

6. C. Thurrott is a business representative for Local 46. During the evening of June 2, 1987, Local 46 members working for NMCL at the “Procter and Gamble” project advised Thurrott they were concerned about a labourer doing what they considered to be their work. Since some members considered quitting and others wanted some form of “job action”, Thurrott went to the project during the morning of June 3, 1987. At approximately 7:15 a.m. on that day, he had a discussion with the Local 46 members in the lunchroom. Thurrott admitted in his evidence that when he spoke to the men in the lunchroom he told them that either the labourer would go or the Local 46 members would go and that the Local 46 members should stay in the lunchroom until the matter was resolved. Thurrott then left the lunchroom and had a discussion with R. Voigt, the heating foreman, and a member of Local 46. Thurrott admitted that he advised Voigt that the Local 46 members would not leave the lunchroom until the labourer went. Thurrott conceded in his evidence that he recognized he was acting illegally. Voigt considered Thurrott’s threat to be serious and since he felt, as a practical matter, that he had no choice, he informed Lapointe that he would have to let him go in order to avoid a wildcat strike. Lapointe was paid for June 4 and 5, 1986 and from June 8, 1986 until this matter came on for hearing, he was assigned work by NMCL at its shop or at another job site. Representations by Local 506 officials on behalf of its members did not succeed in convincing NMCL that it should utilize labourers at the “Procter and Gamble” project.

7. Although counsel for Local 46 suggested otherwise in his argument, the Board had little difficulty in concluding that Thurrott threatened an illegal strike on June 3, 1986, contrary to section 74 of the *Labour Relations Act*. Thurrott, in effect, told Voigt that the Local 46 members would not work until the labourer was removed from the project. Having regard to the fact that Thurrott is an official of Local 46, and to the provisions of subsection 99(2) of the Act, Local 46 is also deemed to be responsible on June 3, 1987 for the threat to call an unlawful strike. Since the Board found the prerequisite conditions to its exercising its authority under section 135 of the Act had been satisfied, it made the directions set out in paragraph 2 of this decision. As the Board has stated in previous decisions, the fact that a jurisdictional dispute between two unions lies at the heart of the dispute does not preclude Local 506 from seeking the kind of relief granted in this case under section 135 of the Act, as opposed to invoking section 91 of the Act.

8. Counsel for Local 506 requested an order from the Board directing NMCL to cease and desist from refusing to employ a member or members of Local 506 to perform the disputed work. Counsel noted that the illegal threat in this case achieved the desired result, namely the removal of the labourer from the project. Counsel submitted that the Board should give Local 506 a complete remedy by restoring the status quo, since to do otherwise would mean that Local 46 would benefit from its illegal conduct. Counsel noted that section 135(1) contemplates an order of the type he was seeking since the section authorizes the Board to direct employers, among others, to do certain things in connection with a threat of an unlawful strike. Counsel emphasized that if the order requested was made, it would be without prejudice to the right of the respondents to claim in any other proceeding that the work in dispute belonged to someone other than Local 506. Local 46 and NMCL were opposed to the Board granting Local 506 this particular form of relief. It appears that

the Board has not had occasion in the past to decide the precise issue now being raised by Local 506.

9. Illegal strikes and lock-outs and threats relating thereto are serious matters requiring a quick remedial response. This proposition is reflected by the Act's provisions and the Board's procedures for dealing with applications under sections 92, 93 and 135 of the Act expeditiously. The essential feature of these provisions and the Board's practice is to address the illegal conduct and bring it to an end. As a general approach, the Board does not attempt to remedy all of the consequences of the illegal activity in this context. Invariably, the illegal conduct constitutes a contravention of the collective agreement binding upon the parties, and the Board has held that the preferable way, with some qualification, for the parties to deal with such contraventions is to resort to their agreed to resolution process, the grievance and arbitration provisions of their collective agreement. This approach is reflected by the Board's decision in *Cameron Packaging Inc.*, [1979] OLRB Rep. July 614. In this case, the Board declined to entertain an unfair labour practice complaint seeking damages for an unlawful lockout. The unlawful lockout determination had been made in a previous Board proceeding. In the Board's view, "the legislative intent is clear that the suitable forum for assessment of damages arising out of a lockout is a Board of Arbitration and not this Board". Although Local 506 is not seeking an order for damages, the principle contained in the Board's general approach is applicable to the facts in this case. The order sought by Local 506 is an attempt on its part to seek a remedy for the consequences of the illegal threat.

10. The Board's remedial response in this case is very broad. The order directs Local 46 and its officials to refrain from threatening an unlawful strike, and to refrain from encouraging an unlawful strike. The order also prohibits Local 46 and its officials from preventing Local 506 from performing the disputed work. Such a broad order specifically addresses the illegal conduct of Local 46, namely the threatening of an illegal strike. Given such an order, NMCL is free to decide who should perform the disputed work and, if it so desires, can assign the work to a labourer.

11. It appears that a jurisdictional dispute does lie at the heart of the problem between Local 506 and Local 46 in this case. It was open to Local 506 to file a complaint under section 91 of the Act, and seek an interim order under subsection 91(8) requiring NMCL to continue to assign the disputed work to a labourer. The most appropriate way to seek directions concerning the assignment of work in the context of a jurisdictional dispute is to invoke section 91 of the Act. In the Board's view, it would not be appropriate to grant Local 506 the additional order requested under section 135 of the Act, even if it would have no prejudicial effect, in a situation where it may ultimately be determined that the work in dispute does not belong to the labourers. If it was determined that the work did belong to labourers, Local 506 would be in a position to obtain damages, if any, for it and its members.

12. Therefore, the applicant was entitled to obtain the directions as set out in paragraph 2 of this decision. Even assuming the Board had the jurisdiction under section 135 of the Act to direct NMCL to cease and desist from refusing to employ a member of Local 506 to perform the disputed work, for the reasons set out above, the Board did not find it appropriate to do so.

0088-87-R United Brotherhood of Carpenters' & Joiners of America, Local Union 27, Applicant v. **Nimel Construction Limited**, Respondent v. Labourers' International Union of North America, Local 183, Intervener

Certification - Construction Industry - Practice and Procedure - Pre-Hearing Vote - No one voting at pre-hearing representation vote conducted at construction site - Applicant conducting no investigation concerning lack of voters nor contacting Board - Three months later applicant's counsel requesting new vote - Objection to vote untimely - Factual basis of objection had come to the attention of the applicant before the deadline for making objections had passed - Certification application dismissed

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *M. Eayrs* and *J. Redshaw*.

APPEARANCES: *Douglas J. Wray* and *Luis Camara* for the applicant; no one appearing for the respondent; *G. Charney* and *Onelio Zanin* for the intervener.

DECISION OF THE BOARD; September 29, 1987

1. Subsequent to the taking of the representation vote directed by the Board in this application, in which no ballots were cast, a hearing was scheduled to hear the evidence and representations of the parties with respect to all matters arising out of and incidental to the application, including whether or not the applicant should be permitted to convert the application into one in which no pre-hearing representation vote had been requested.

2. That hearing was scheduled for August 31, 1987. By letter dated and delivered to the Board on August 28, 1987, counsel for the applicant advised that:

This matter is scheduled for hearing on August 31, 1987. We have been advised by our client that the reason no one voted in this case was because the employees were not working on the site on the date of the vote. In the circumstances and if necessary, we will request that new voting arrangements be made to ensure employees are given an opportunity to vote.

3. At the hearing on August 31, 1987, before a differently constituted panel of the Board, Mr. Caley appeared on behalf of the applicant. He advised that Mr. Wray, who had been counsel for the applicant throughout, had been suddenly called out of town on an urgent personal matter. Mr. Caley submitted that the Board should first deal with the issue of the intervener's status to participate in these proceedings. The intervener's position was that the Board should deal with the "vote result" issue first. Reasoning that the applicant should be in no different position now than it was when the matter was before the panel that directed the representation vote, the Board ruled that it was inappropriate to deal with the issue of the intervener's status before the issue of the vote result.

4. Mr. Caley, on behalf of the applicant, immediately requested an adjournment on the basis that he was unable to proceed on the vote result issue in the absence of Mr. Wray. The intervener opposed the adjournment. Under the circumstances, the Board adjourned the hearing to September 11, 1987 which date was agreeable to the applicant and the intervener. Mr. Mule, who appeared on August 31st for the respondent, indicated that he would be unable to attend on that date but did not suggest that the matter should not proceed then. Counsel for the intervener (then Mr. Richmond) then indicated that the intervener was taking the position that the applicant's objection to the manner in which the representation vote was conducted and its request for a new vote were untimely.

5. At the meeting with the Labour Relations Officer on May 13, 1987, which the respondent did not attend, the applicant and intervener agreed to vote arrangements. The proposed date of the vote was Monday, June 1, 1987. An alternate date agreed to was Monday, June 8, 1987. It was further agreed that the vote would take place between 11:30 a.m. and 12:00 o'clock noon at a job site of the respondent's at Bayview Avenue and 16th Line, Richmond Hill. Representatives of the applicant and intervener attended at the time and place agreed to for the taking of the representation vote on June 1, 1987. However, the Board's decision directing the taking of the vote did not issue until that day and the vote was not in fact taken on June 1, 1987. Subsequently, on June 5, 1987, a representative of the applicant attended at the Bayview Avenue and 16th Line job site. He spoke with the employees of the respondent on the job site and advised them that the representation vote would be taken on June 8, 1987.

6. On June 8, 1987, a Returning Officer and representatives of the applicant and intervener attended at the Bayview Avenue and 16th Line job site for the taking of the vote. When no one appeared to cast a ballot, the applicant's representative, Mr. Camara, searched the job site but could not find any employees of the respondent. He was advised by another contractor on the job site that the respondent's employees "might" be on a job in Burlington. Mr. Camara returned to the polling station and advised the Returning Officer only that there were no employees of the respondent on the job site. The polling station remained open until the designated time expired. No ballots were cast. The Returning Officer and the representatives of the applicant and intervener all executed a certification of conduct of election asserting that:

We, the undersigned, acted as scrutineers for the parties herein in the conduct of the balloting at the time and place above mentioned. We certify that the balloting was fairly conducted and that all eligible voters were given an opportunity to cast their ballots in secret, and that the ballot box was protected in the interest of a fair and secret vote.

At no time did the representative of the applicant take any exception to the manner in which the vote was conducted or indicate that they applicant intended to make any objections or representations with respect thereto.

7. A Form 72, Notice of Report of Returning Officer, where a Board has directed that ballot box be sealed dated June 8, 1987 was sent to the parties. Attached to it was a copy of the Officer's report with respect to the representation vote. Paragraphs 3 and 4, Form 72 states:

TAKE NOTICE that if you desire to make representations,

- (a) as to any matter relating to the representation vote; or
- (b) (where a pre-hearing representation vote has been held) in connection with the application;

you shall send to the Board a statement of desire to make representations which shall,

- i. be in writing signed by the person making the statement or his representative,
- ii. contain the names of the parties to the application,
- iii. contain a return mailing address, and
- iv. contain a statement as to whether you desire a hearing before the Board.

Your statement of desire must contain a summary of the representations you wish the Board to consider.

4. A statement referred to in paragraph 3 shall be sent to the Board so that,
 - (a) it is received by the Board; or
 - (b) if it is mailed by **registered mail** addressed to the Board at its office, 400 University Ave., Toronto, Ontario, M7A 1V4, it is mailed; **not later** than the 15th day of June, 1987.

Mr. Wray admitted that the applicant received its copy of Form 72. In our view, there is no merit to Mr. Wray's suggestion that because a copy was not sent to his office, as requested on the application, the notice received by the applicant is defective. The applicant did nothing whatsoever subsequent to the taking of the representation vote, either before or after receiving Form 72, until August 28, 1987. Subsequent to June 8, 1987, it conducted no investigation with respect to why no employee of the respondent appeared to cast a ballot or where any of them were during the period of time the polling station was open. It did not contact counsel. It did not write or otherwise contact the Board. It did nothing at all until a meeting of Mr. Wray on August 28, 1987. Immediately upon learning of the circumstances surrounding the taking of the vote, Mr. Wray wrote the letter set out above.

8. Mr. Wray, for the applicant, argued that a new representation vote should be directed in order to give affected employees a real opportunity to vote. He submitted that such a direction would prejudice no other party.

9. The Board has always recognized the need for expedition in matters that come before it, particularly in applications for certification in the construction industry. Consequently, the Board, while acknowledging that its procedures ought not to be unduly technical, has concluded that that expedition and certainty are essential in proceedings where representations votes in the construction industry have been held and. Accordingly, the Board has been relatively stringent in applying the deadlines established with respect thereto. The Board has concluded that the test to be applied in relation to the timeliness of objections with respect to the taking of a representation vote is not prejudice to another party, but whether, with the exercise of reasonable diligence, the factual basis of the objection would not have come to the attention of the objector until after the deadline for making objections had passed (see *Ontario Engineered Suspensions (Blenheim) Ltd.*, [1987] OLRB Rep. May 768; *H.D. Lee Company of Canada Limited*, [1975] OLRB Jan. 55; *Pure Spring Canada Ltd.*, [1964] OLRB Rep. Dec. 476).

10. In this case, the applicant was aware of the general nature of the problem on the very day the vote was taken. It did nothing to either investigate the matter or to indicate any objection until almost three months later and, in our view, fail to exercise reasonable, or any, diligence with respect to either investigating the material facts or making its objections. Accordingly, we find that the applicant's request must be denied and we so ruled, orally and without reasons at the hearing.

11. After ruling as aforesaid, the Board asked counsel for the applicant whether, under the circumstances, he could offer any reason why this application should not be dismissed. He offered no such reason and specifically did not pursue any argument that the applicant should be permitted to convert its application to one in which no pre-hearing representation vote had been requested.

12. Accordingly, this application was dismissed.

1021-87-M United Food & Commercial Workers International Union, AFL, CIO, CLC, Applicant v. Royal Mattress Mfg. Co., Respondent

Employee Reference - Practice and Procedure - Agreement by parties on employee list during certification process - Whether union can bring an employee reference for an individual who was not on schedules - An agreement that a person is not within the unit, or on the schedules, is not necessarily an agreement that the person is not an employee because s/he exercises managerial functions - No agreement on employee status - Officer appointed

BEFORE: *Robert J. Herman*, Vice-Chair, and Board Members *G. O. Shamanski* and *R. Montague*.

DECISION OF THE BOARD; October 13, 1987

1. This is an application under section 106(2) of the *Labour Relations Act* by the applicant union for a determination of whether Norman Tremblay is an "employee" within the meaning of the Act. The respondent employer takes the position that Tremblay is excluded from the bargaining unit by virtue of section 1(3)(b) because he exercises managerial functions, and more particularly, that the Board ought to decline to inquire into this matter on the basis that the parties have already agreed to exclude Tremblay on this basis.

2. The applicant was certified as bargaining agent for employees of the respondent in a decision dated April 28, 1987 (Board File No. 0013-87-R), based upon the agreement of the parties, and without a hearing. As required, the respondent had filed with the Board Schedules of employees claimed by the respondent to fall within the bargaining unit requested by the applicant. Tremblay was not listed on those Schedules. In correspondence to the Board in the instant proceeding, the applicant confirms it was informed during the certification proceeding that Tremblay's name was not on the Schedules, as the employer considered him to exercise managerial functions. The applicant also noted that it did not consider him to be managerial, but recognized that the matter could be dealt with directly by the parties during negotiations. On this basis, the applicant agreed to the list of employees as set out in the Schedules and the certification application proceeded on that agreement and a certificate issued.

3. We do not agree with the respondent's submissions that the Board ought not to entertain this application in these circumstances. The Board noted the circumstances in which it would decline to entertain a section 106(2) application in *Westmount Hospital*, [1980] OLRB Rep. Oct. 1572:

...

4. Where parties have by virtue of their collective agreement or other form of agreement settled upon the employment status of a person, the Board at one time refused to let either party at any time withdraw unilaterally from that agreement by means of an application under section 95(2) of the Act. (See, for example, *Belleville General Hospital*, [1975] OLRB Rep. June 487.) The basis for this policy is that a party having entered into an agreement on the status of a particular person, cannot, in the absence of a material change in duties and responsibilities, come before the Board and claim that a "question" exists as to the status of that person. More recently, the Board has liberalized this policy so as to permit an application to be brought during negotiations for the renewal of a collective agreement, after the collective agreement has expired. Parties therefore are no longer bound indefinitely to the terms of an initial agreement. The Board will not however, permit an application (other than one relating to *changes* in the duties and responsibilities) to be brought during the first set of negotiations following agreement upon the status of the person in question (*Collingwood General Marine Hospital*, [1975] OLRB Rep. Jan. 18).

4. An agreement that an individual is not within the bargaining unit, or on the schedules, is not necessarily an agreement that s/he is not an “employee” because s/he exercises managerial functions. Absent a clear indication that parties have agreed during the certification proceeding to exclude an individual because s/he exercises managerial functions, a party remains free to apply to the Board after a certificate issues, pursuant to section 106(2), and the Board would deal with the question of whether s/he exercises managerial functions. If parties want to argue that the employee status of an individual has been agreed to, and that *Westmount Hospital* principles would therefore cause the Board not to inquire into his or her status as an employee, the Board must have before it an agreement as to “employee” status. The record before us does not constitute such an agreement.

5. Indeed, this very process was contemplated and approved by the Board in *Robin Hood Multifoods Inc.*, [1985] OLRB Rep. July 1159:

7. Section 6 of the Act speaks to the appropriate bargaining unit. Subsection (1) provides:

Subject to subsection (2), upon an application for certification, the Board shall determine the unit of employees that is appropriate for collective bargaining, but in every case the unit shall consist of more than one employee and the Board may, before determining the unit, conduct a vote of any of the employees of the employer for the purpose of ascertaining the wishes of the employees as to the appropriateness of the unit.

The bargaining unit is an abstraction, a generic description of an employee group, the composition of which is defined in terms of the inclusion or exclusion of employees according to the nature of the work each performs. The bargaining unit is defined without reference to the identity of any particular employee. Bargaining rights are not restricted to persons employed at the time those rights are acquired; at any given time bargaining rights will extend to all persons then employed at jobs which fall within the scope of the bargaining unit description.

8. A question of bargaining-unit composition is concerned with identifying the sorts of employees who will be included in or excluded from the unit, and not with determining which persons are employees of the included sort at a given time. The latter question is addressed by section 7 of the Act:

7.-(1) Upon an application for certification, the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and the number of employees in the unit who were members of the trade union at such time as is determined under clause 103(2)(j).

(2) If the Board is satisfied that not less than 45 per cent and not more than 55 per cent of the employees in the bargaining unit are members of the trade union, the Board shall, and if the Board is satisfied that more than 55 per cent of such employees are members of the trade union, the Board may direct that a representation vote be taken.

(3) If on the taking of a representation vote more than 50 per cent of the ballots cast are cast in favour of the trade union, and in other cases, if the Board is satisfied that more than 55 per cent of the employees in the bargaining unit are members of the trade union, the Board shall certify the trade union as the bargaining agent of the employees in the bargaining unit.

Read literally and in isolation from the balance of the section, subsection (1) might be interpreted to require that the Board determine the precise number of persons in the unit on the application date and the precise number of those persons who were members of the applicant at the relevant time. However, the purpose of the directions in subsection (1) is made clear by subsections (2) and (3): the object is to determine only whether the number of members among bargaining-unit employees exceeds one or other of the relevant percentages. From that perspec-

tive, it is apparent that a literal interpretation of subsection (1) could require the Board to determine questions of fact which are of no consequence to the outcome of the application, as where the only outstanding question is whether the number of members among twenty bargaining-unit employees was ten or eleven at the relevant time. It should not be supposed that the Legislature intended that the final disposition of certification applications be delayed by litigation of issues whose resolution could in no event affect that disposition in any way. In our view, the obligation imposed on the Board by subsection 7(1) is discharged when the Board can say with certainty either that the percentage of members among bargaining-unit employees is more than 55 per cent or that it is not less than 45 per cent and not more than 55 per cent. But for the provisions of subsection 6(2), however, the Board cannot resolve the questions posed by section 7 without first settling on a description of the appropriate bargaining unit.

9. Subsection 6(2) of the Act provides:

Where, upon an application for certification, the Board is satisfied that any dispute as to the composition of the bargaining unit cannot affect the trade union's right to certification, the Board may certify the trade union as the bargaining agent pending the final resolution of the composition of the bargaining unit.

It is important to note that this provision appears in section 6, which deals in the abstract with identification of the sort of employees who will be included in a bargaining unit, rather than in section 7, which deals with the identity and numbers of persons employed in a unit at a particular time. Subsection 6(2) is an exception to the requirement of subsection 6(1) that the definition of the appropriate bargaining unit be fully settled before an applicant can be given the right to act as exclusive bargaining agent for any employees of the respondent. A "dispute as to the composition of the bargaining unit", as those words are used in subsection 6(2), is a dispute over bargaining-unit definition or description, a dispute over the sorts of employees who will fall within the bargaining unit, not a dispute over whether any particular individual is an employee of the requisite sort, nor a dispute whether a particular individual is an employee at all.

10. Subsections 1(3)(b) and 106(2) of the Act provide:

1.- (3) Subject to section 90, for the purposes of this Act, no person shall be deemed to be an employee,

- (b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

* * *

106.- (2) If, in the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee or as to whether a person is a guard, the question may be referred to the Board and the decision of the Board thereon is final and conclusive for all purposes.

As a person who exercises managerial functions is not an "employee" as that term is used in the Act, there can be no question whether such a person is the sort of employee who should be included in or excluded from the "unit of employees that is appropriate for collective bargaining." The kind of question contemplated by subsection 106(2) is not, strictly speaking, a "dispute as to the composition of the bargaining unit." Such a question can affect "the number of employees in the bargaining unit at the time the application was made" but, like any other "numbers" question, need not be dealt with in a certification application if its answer would in no event affect the result.

11. We are satisfied that where, as here, the description of the appropriate bargaining unit has been settled and the Board can say with certainty that more than 55 per cent of the employees in that unit on the application date were members of the applicant at the relevant time, the Board does have the jurisdiction to grant the applicant a final certificate, notwithstanding the existence of questions which could be dealt with in an application under subsection 106(2). Although the parties to this application agreed to attempt settlement of those questions before asking the

Board to answer them, their agreement played no part in our conclusion on the jurisdictional question. The Board would have jurisdiction to grant a final certificate in these circumstances even if there were no such agreement.

12. There was no suggestion in this case that the bargaining-unit description would be affected by a determination of the employee status of the disputed individuals. We need not deal here with the question whether and to what extent the Board must or ought to continue to resolve questions of the application of subsection 1(3)(b) in the fine tuning of a bargaining-unit description when those questions do not otherwise affect the result.

6. By deferring questions of managerial status which cannot affect the entitlement of an applicant to be certified, nor the bargaining unit description, certification applications can proceed more expeditiously, without unnecessary delays or drains upon Board resources. At the same time, parties are afforded a first opportunity, after the bargaining agent is certified, to attempt to resolve these problems through negotiations. Where negotiations are unable to so resolve matters, as in the instant case, and absent a clear agreement with respect to the status of the individual in question, the Board will entertain a section 106(2) application. To do otherwise would undercut the rationale and practice of *Robin Hood Multifoods Inc.* (*supra*).

7. As *Robin Hood Multifoods Inc.* indicates, final certificates will issue in those cases where the description of the bargaining unit is settled and the applicant has demonstrated it has over 55 per cent support in that unit regardless of the resolution of the status of the disputed individuals. Where the status of individuals might affect an applicant's entitlement to be certified, the Board does not adopt the same approach. In *Ivaco Inc.* [1987] OLRB Rep. April 511, the Board declined to allow an applicant to agree to the status of individuals "for purposes of the count", and then seek to have their status determined pursuant to an application under section 106(2), where the certificate would not have been granted but for the applicant's agreement as to the number of employees in the unit.

8. In the instant case, whether Tremblay was in the bargaining unit or not at the time of the certification could not have effected the applicant's entitlement to be certified for the described bargaining unit. Nor does it appear that the parties agreed that he was not an "employee" within the meaning of the Act. Accordingly, a Board Officer is hereby appointed to inquire into the duties and responsibilities of the disputed individual, and to report back to the Board.

2034-86-R United Brotherhood of Carpenters' & Joiners of America, Local Union 27, Applicant v. **Runnymede Development Corporation Limited**, Respondent v. Labourers' International Union of North America, Local 183, Intervener

Bargaining Rights - Certification - Construction Industry - Parties - Practice and Procedure - Employer seeking to resile from agreement on employee list and revert to earlier position - Inappropriate for Board to permit employer to resile - Labourers Union seeking to intervene in carpenters application on the basis that it represented all construction employees of the employer pursuant to a collective agreement between it and the Housing Labour Bureau - Labourers Union denied intervener status on basis of collective agreement which does not cover carpenters - Labourers Union granted status to intervene based on membership evidence submitted on date of hearing - Labour relations officer appointed

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *D. A. MacDonald* and *J. Redshaw*.

APPEARANCES: *Douglas J. Wray*, *David McKee*, *Tony Bucci* and *John Cartwright* for the applicant; *Mary Ellen Cummings*, *Irving Moss* for the respondent; *A. M. Minsky* for the intervener.

DECISION OF THE BOARD; October 6, 1987

1. The Board finds that the applicant is a trade union within the meaning of sections 1(1)(p) and 117(f) of the Act and is an affiliated bargaining agent of a designated bargaining agency. Pursuant to the designation by the Minister under section 139(1) of the Act on April 10, 1980, the designated employee bargaining agency is the United Brotherhood of Carpenters and Joiners of America, and the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America.

2. This is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

144.-(1) An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection (3) or by voluntary recognition.

3. In paragraph 7 of its application, the applicant describes the unit of employees of the respondent that it claims is appropriate for collective bargaining and for which it seeks to be certified as:

- (a) all carpenters and carpenters' apprentices employed by the employer in the industrial, commercial and institutional section of the construction industry in the Province of Ontario; and
- (b) all carpenters and carpenters' apprentices employed by the employer in Board Area 8, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foremen.

4. On November 17, 1986, a differently constituted panel of the Board ("the Satterfield panel") issued the following order with respect to this application:

A Board Officer is authorized to inquire into and report to the Board on the list of employees filed by the respondent and the composition of the bargaining [sic] agreed by the applicant and respondent to be appropriate under the *Labour Relations Act* for collective bargaining.

5. Pursuant thereto, the parties (which by then included the intervener) met with a Labour Relations Officer C. Wheatley on November 27, 1986 and with Labour Relations Officer, B. Jackson on January 22, and February 4, 1987. At the January 22, 1987 meeting, the parties executed the following Memorandum:

2034-86-R

United Brotherhood of Carpenters and Joiners of America L27,

Applicant,

- and -

Runnymede Development Corporation Ltd.,

Respondent,

- and -

Labourers International Union of North America,

Intervenor.

(1) With respect to a bargaining unit description the parties agree that

all carpenters and carpenters apprentices employed by the Respondent in the industrial commercial and institutional sectors of the construction industry in the Province of Ontario;

- and -

all carpenters and carpenters apprentices employed by the respondent in all sectors of the construction industry except the industrial commercial and institutional sectors in Board Area 8; save and except non working [sic] foremen and persons above the rank of non working [sic] foremen

(2) It is the intervenors [sic] position that the bargaining unit is inappropriate because the persons covered by the application are already bound by a collective agreement, specifically between the Toronto Housing Labour Bureau and the Labourers International Union of North America L183 effective May 1, 1985 to April 30, 1987 specifically Article 1.02. It is further the intervenors [sic] position that the respondent and the intervenor are bound to the current M.T.A.B.A. agreement. The intervenor agrees to furnish said document by the end of business Jan 23, 1987 to the Board.

(3) The parties agree that the following names constitute a [sic] list of employees in the bargaining unit at work on the date of application.

Brian Bursey
Scott Wells

(a) It is the respondents position that the list also contains the names

Andy Campbell
Emmanuel Lima
Michael Robertson
Tony Iaccino
Sam Primerano

(b) It is the applicants [sic] position that these names (persons) were i) not at work on the application date; ii) not engaged in carpentry either on the application date or during a representative period; (iii) not employed by the respondent.

(c) It is the intervenors [sic] position that all the names on the list fall within the collective agreement and were performing working captured by the collective agreement at times.

Dated at Scarborough this 22nd day of January, 1987.

"A. Bucci"
Applicant
Toni Bucci

"Irving Moss"
Respondent
Irving Moss

"Antonio J. Pinto"
Intervenor
Toni Pinto

6. Subsequently, by letter dated January 28, 1987, the applicant challenged the intervenor's right to participate in this proceeding. In addition, at the meeting on February 4, 1987, the applicant and respondent agreed, by memorandum, as follows:

Board File #2034-86-R

Between:

United Brotherhood of Carpenters and Joiners of America L. 27,

Applicant

- and -

Runnymede Development Corporation Limited,

Respondent,

- and -

Labourers International Union of North America L. 183,

Intervenor.

The parties to this application state as follows

- 1) It is the position of the applicant and respondent that the appropriate bargaining unit description is as follows

all carpenters and carpenters apprentices in the employ of the respondent in the industrial, commercial, and institutional sectors of the construction industry in the Province of Ontario; and

all carpenters and carpenters apprentices in the employ of the respondent in all sectors of the construction industry except the industrial, commercial and institutional sectors in O.L.R.B. Area 8;

save and except non-working foremen and persons above the rank of non-working foremen.

- (2) It is the position of the applicant and respondent that a complete list of employees in the applied for bargaining unit at work on the date of application is

Brian Bursey
Scott Wells

- (3) It is the applicant and respondent position that no formal Labour Relations Officers report is required

"A. Bucci"
Business Agent
For the Applicant

"Irving Moss"
For the Respondent
Irving Moss
Construction Manager

- (4) The applicant and respondent further note that the intervenor [sic] (LI-UNA 183) has indicated it wishes to make submissions to the Board on this matter as per the statement of positions dated January 22, 1987. This note is without prejudice to any argument that L.I.U.N.A. Local 183 has no status to intervene in this application.

"A. Bucci"
Applicant

"Irving Moss"
Respondent
Construction Manager

The officer advised the parties that he intended to report to the Board with respect to the situation as it then was and that they should make their submissions with respect to his report directly to the Board. At the request of the respondent and the intervenor, the Board convened a hearing with respect to the matter on May 14 and 15, 1987.

7. At the hearing, counsel for the respondent advised the Board that her client wished to resile from the agreement it entered into with the applicant on February 4, 1987 and revert to the position it had adopted on January 22, 1987 and previously. The intervenor's position is that the respondent ought to be allowed to do so. The applicant argues that the Board should not permit the respondent to resile from an agreement it had made over three months before. It does concede, however, that if the intervenor has status to participate in these proceedings it could raise the same "list" issues that the respondent seeks to raise by reverting to its previous position.

8. The intervenor asserts the right to participate in these proceedings on the basis that it represents all construction employees of the respondent who are affected by this application pursuant to a collective agreement between it and the Toronto Housing Labour Bureau ("the Housing Bureau Agreement") dated May 1, 1985. The intervenor also asserts that the respondent is bound to the collective agreement it has with the Metropolitan Toronto Apartment Builders Association ("the MTABA agreement") by virtue of the "cross-over" provision in Article 1.02 of the Housing Bureau Agreement. In the alternative, the intervenor claims to represent some of the employees affected by this application and has filed membership evidence in support of that position.

9. The respondent supports the intervenor's position with respect to the issue of status.

10. The applicant denies that either the Housing Bureau Agreement or the MTABA agreement cover any of the employees affected by this application. It also denies that the intervenor otherwise represents any of the employees affected by this application unless it has filed membership evidence on behalf of one or both of the two persons that it asserts, and the respondent and intervenor agree, were in the bargaining unit on the date this application was made.

11. As a preliminary matter, the intervenor submits that this panel does not have the jurisdiction to deal with the issues of its status in these proceedings and the status

of the February 4, 1987 agreement between the applicant and the respondent because these relate to the Satterfield panel's decision authorizing an officer to inquire into and report to the Board with respect to the list of employees and composition of the bargaining unit. Counsel argues that that order, which stands unless varied or reconsidered, has not been complied with and that it is inappropriate for this panel to sit "on appeal" of the Satterfield panel's decision. In support of the latter proposition, counsel sites *Knight Security Guards Limited*, [1970] OLRB Rep. June 377.

12. In our view, there is no merit to the intervener's submission that this panel cannot or should not deal with this matter. The Satterfield panel merely authorized a Labour Relations Officer to inquire into and report to the Board with respect to the list of employees and composition of the bargaining unit that is the subject of this application. It did not direct that any examinations be held. In this case, the inquiry directed by the Board occurred in two stages and involved two different Officers. Both have made inquiries and both have reported to the Board with respect to the list of employees and composition of the bargaining unit. This panel is neither being asked to, nor it is necessary for it to, reconsider or vary the decision of the Satterfield panel which has, in our view, been complied with. It is as a result of the development on February 4, 1987 that the determination of the intervener's status in these proceedings became pivotal to the manner in which the officer would proceed. If the intervener does not have status to participate in these proceedings, the officers' inquiry would have been complete because the Board could, and normally would as things then stood, have disposed of the application on the basis of the February 4, 1987 agreement between the applicant and the respondent (and from which the respondent now seeks to resile). If the intervener has status, the officer's inquiry could not be complete without the examinations of the disputed employees with which the intervener asserts the officer should have proceeded. In effect, the officer decided to report and remit to the Board this pivotal issue of the intervener's status.

13. We do not accept the intervener's assertion that the officer has made any rulings that he was not entitled to make. Nor can we accept its allegations that this hearing has been brought about because the officer questioned the intervener's status to participate in this proceeding. That issue has clearly been raised by the applicant. Further, the Satterfield panel had only the material that was in the Board file on November 17, 1986 before it when it made the order set out in paragraph 4 above. Everything that was before the Satterfield panel is also before this panel. Consequently, we are hard-pressed to understand how the Satterfield panel could be in any better position to deal with the issues now before the Board. Finally, it is quite common in, for example, construction industry applications for certification such as this one, in both construction and non-construction applications for certification in which a pre-hearing representation vote is requested, and in applications under section 106(2) of the Act, for one panel of the Board to authorize a Labour Relations Officer to inquire into and report to the Board with respect to a matter in issue and for a differently constituted panel of the Board to deal with the officer's report and conduct a hearing, if one is required, with respect thereto. This enables the Board to deal with such matters more expeditiously than would otherwise be possible in many cases. In our view, the Satterfield panel is neither seized with any aspect of this application, nor better placed than any other panel to deal with the issues now before the Board. In the result, we find that this panel has the jurisdiction to deal with this matter and we find it appropriate to do so.

14. A trade union wishing to intervene in an application for certification by another trade union must establish that it represents or is the bargaining agent for at least one employee in the bargaining unit that is the subject of the application before it is entitled to participate in the proceedings. In *Napev Construction Limited*, [1976] OLRB Rep. Mar. 109 (at page 111), the Board summarized its approach to the issue of a trade union's status to intervene in certification proceedings:

Where attempts have been made to intervene in certification proceedings, the Board has consistently held that, in order to safeguard the rights of parties originating proceedings, and with a view to eliminating delay by parties claiming an interest a would-be intervener must meet certain requirements. These requirements are deemed necessary in the field of industrial relations where time is indeed of the essence in order to avoid delay, multiplicity of proceedings and frustration of the purposes of the Act by parties who have no real representative status with respect to the employer and the employees involved. The Board has always required that an intervener

must be either an employee in the bargaining unit to which the proceedings relate or a union holding representational authorization from one or more persons in the bargaining unit, or be the bargaining agent for employees in the bargaining unit. In the absence of these requirements, intervention has been denied.

(See also *Neo Industries Limited*, [1976] OLRB Rep. March 88; *ESB Canada Limited*, [1979] OLRB Rep. Dec. 1156.)

15. By certificate dated May 20, 1983, the Board certified the intervener as the bargaining agent for all construction labourers employed by the respondent in Board Area 8, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above that rank. Parties are not obliged to incorporate the precise bargaining unit described in a certificate granted by the Board in any collective agreement between them. They may, by agreement, alter the bargaining rights granted by the Board by either expanding or abridging them (*Gilbarco Canada Ltd.* [1971] OLRB Rep. March 155; *MacGregor Crane Service*, [1979] OLRB Rep. Aug. 777). When, subsequent to the Board certificate being issued, the respondent became bound by the Housing Bureau Agreement the bargaining rights granted to the intervener by the Board were somewhat altered as a result. The effective dates of the Housing Bureau Agreement which is said by the intervener and, at the hearing, by the respondent, to be a bar to this application are May 1, 1985 to April 30, 1987. It contains the following provisions:

ARTICLE 1 - RECOGNITION

1.01(a) Each of the Employers recognize the Union as the Collective Bargaining Agent for all of its own Construction Employees (whose Classifications fall into a category listed in Schedule "A", attached hereto) engaged in the on-site construction of all types of low-rise housing only and their natural amenities while working within the following areas:

Geographical Area No. 8, established and used by the Ontario Labour Relations Board in matters of Certification (The Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham) and the County of Simcoe.

(b) Low-rise housing for the purposes of this Agreement shall mean non-elevated housing of not more than three (3) storeys in height (basement plus three (3) storeys).

1.02 Each of the Employers agree that when engaged in the on-site construction of apartment buildings, they shall abide by the *terms and conditions* of the Collective Agreement between the Metropolitan Toronto Apartment Builders Association and the Labourers' International Union of North America, Local 183, *then in effect*. The term "apartment buildings", when used in this Article, shall have the same meaning as in the Collective Agreement between the Metropolitan Toronto Apartment Builders Association and the Labourers' International Union of North America, Local 183.

1.03(a) The Employer agrees to sublet the following work only to Contractors who are in contractual relations with the Union:

- i) Basement forming;
- ii) Concrete and Drain;
- iii) Frame Carpentry.

• • •

(c) Should a subcontract for general on-site labour, as defined in Article 1, 1.01 and Schedule

"A", Section 6 - Classifications, hereof, be awarded, such subcontractor must be in contractual relationship with L.I.U.N.A., Local 183.

Notwithstanding the preceding, and without prejudice, the following will be exempted:

- i) Final House and Window Cleaning, and on-going Housekeeping Maintenance;
- ii) Landscaping and Driveway Paving;
- iii) Those Labourers normally employed by traditional Trades such as Masonry, Drywall, Mechanical, etc.

• • •

1.05 The Employer recognizes that the Union represents and bargains for its Members in various other Sectors of the Construction Industry not covered by this Agreement, such as Concrete Forming, Sewer and Watermain Construction, Road Building, etc.

Therefore, the Employer hereby agrees to recognize the Union as the Bargaining Agent in such Residential Sectors of the Construction Industry as it may from time to time become engaged in for its Labourers, and will meet with the Union in such event to negotiate on the appropriate applicable Collective Agreement for such work.

• • •

ARTICLE 7 - SCHEDULE "A"

7.01 Attached hereto as Schedule "A" to this Agreement are Schedules of:

- 1. Hours of Work and Overtime
- 2. Wages
- 3. Payment of Wages
- 4. Vacation Pay & Statutory Holiday Pay
- 5. Premium Classifications
- 6. Classifications
- 7. Working Dues
- 8. Pension Plan
- 9. Welfare
- 10. Travel Allowance and Map
- 11. Other Conditions of Employment
- 12. Wage Schedule

• • •

9.05 It is understood that this Agreement relates solely to the Bargaining Unit described in Article 1, 1.01 herein, and the said Agreement cannot be utilized in any way as an offset with respect to Collective Agreements between the parties hereto for any other Bargaining Units.

• • •

Schedule A

6. CLASSIFICATIONS

6.1 Employees covered by this agreement shall be all construction employees employed in accordance with Article 1, 1.01 hereof, save and except employees employed as non-working foremen, watchmen and engineering staff.

For the purposes of this Agreement, construction employees shall be generally those employees engaged in part, or all, of the following work or job functions, but shall in no way be limited to the following, which is intended as a general description only:

- Handymen
- Cleaning (all types)
- Material Handlers and Stockpilers
- Welders' Helpers
- Landscapers
- Salamander Heaters
- Flagmen
- Concrete Workers (except Concrete Finishers)
- Sheathing and Shoring Men
- Concrete Curers, Oilers and Painters
- Graders, Timbermen, Temporary Fencing, Hoarding and Guard Rail Installers, Maintenance Men, Storemen, Gardeners
- Pipe Insulators
- Farm Tractor Drivers

[emphasis added]

16. Article 1.02 of the Housing Bureau Agreement is what has come to be known as a "cross-over clause." This label does little to advance an understanding of the effect of any given such provision. Generally, they incorporate by some or all of another collective agreement into the collective agreement in which they are found. However, the precise effect of every such provision will depend upon its particular wording.

17. Scope or recognition clauses in collective agreements in the construction industry are generally worded in terms of work performed rather than in terms of the trade or employees covered. Provisions like Article 1.02 of the Housing Bureau Agreement are common in such collective agreements in circumstances where the parties recognize that the employer(s) bound by agreement, though ordinarily engaged in the type of work covered by it, may also from time to time be involved in other types of work which could also be performed by members of the trade union. The Board has held that although, as a general matter, such provisions operate to incorporate into the collective agreement in which they are found some of the terms and conditions of the collective agreement(s) to which they refer, they do not operate to bind an employer to the referenced collective agreement(s) as though it is a party thereto (see *Frank Plastina Investments Ltd.*, [1986] OLRB Rep. June 720; *Sandercock Construction (1976) Ltd.*, [1984] OLRB Rep. April 653; *C.D.C. Contracting*, [1982] OLRB Rep. Nov. 1589). As a result, provisions like Article 1.02 of the Housing Bureau Agreement can operate to broaden the bargaining unit of employees for whom the employer recognizes the trade union as bargaining agent. Recognizing a trade union as the bargaining agent for certain employees, either by expanding the scope of an existing bargaining unit or otherwise, require a mutual intent to do so on the part of the employer(s) and trade union concerned. The requisite intent may be implicit or explicit but the mere existence of some "bargaining" with respect to certain employees is not sufficient to establish that the parties intended the trade union to be the exclusive bargaining agent for those employees. For example, parties to a collective agreement can bargain with respect to, and include in a collective agreement, provisions relating to wages, benefits, or working conditions of employees who are not intended to be in the

bargaining unit covered by that collective agreement (*Canadian Red Cross Blood Transfusion Service*, [1981] OLRB Rep. Feb. 137).

18. Article 1.02 of the Housing Bureau Agreement operates to require all employers bound by it, including the respondent, to apply the “terms and conditions” of the MTABA Agreement “then in effect” when engaged in the on-site construction of “apartment buildings”, as defined in the MTABA Agreement. This is unlike the situation in *Canadian Red Cross Blood Transfusion Service*, *supra*, and *Sandercock Construction*, *supra*, where the parties agreed only to apply those provisions of a referenced collective agreement relating to wages and associated benefits. It is, however, very much like the situation in *C.D.C. Contracting*, *supra*, and *Frank Plastering Investments Ltd.*, *supra*, where the parties to a collective agreement referred to the “terms and conditions” of six other “applicable” collective agreements. In both of those cases the Board found that the employer, though not a party to the collective agreement referred to, was obliged to perform all work covered thereby in accordance with the terms and conditions thereof, including using only members of the trade union which was a party to the collective agreement containing the referencing clause. In our view, there is no material difference between the words and effect of Article 1.02 of the Housing Bureau Agreement and the relevant clauses in *C.D.C. Contracting*, *supra*, and *Frank Plastering Investments Ltd.*, *supra*. Accordingly, we find that the words of Article 1.02 of the Housing Bureau Agreement are intended to and do operate to make the intervener the exclusive bargaining agent for all employees of employers bound thereby, including the respondent, who come within the bargaining unit described by Article 1.01 of the MTABA Agreement as well as for all of their employees covered by the Housing Bureau Agreement. This is, in effect, positions taken by the intervener and the respondent at the hearing.

19. Consequently, when the respondent to this application, although not a member of the MTABA and not a party to the MTABA Agreement, is engaged in construction work which is not covered by the Housing Bureau Agreement, but which is covered by the MTABA Agreement, it must do so, pursuant to Article 1.02 of the Housing Bureau Agreement, in accordance with *all* of the terms and conditions of the MTABA Agreement in effect at the time. As a result, the following provisions of the MTABA Agreement are relevant to our considerations in this proceeding:

ARTICLE 1 - RECOGNITION - CO-OPERATION

CONTRACTING OUT

- 1.01 Each of the Employers recognize the Union as the Collective Bargaining Agent for all of its own construction employees, (whose classifications fall into a category listed on Schedule “A” attached hereto), engaged in the on-site construction of all types of apartment buildings only and their natural amenities, and without restricting the generality of the foregoing, and for the purposes of clarification, it is agreed that the following building types shall be deemed to be an apartment building for the purposes of this Agreement:

• • •

- (vii) a separate residential structure(s) which forms part of a single project with an apartment building(s) under a common deed, architectural design and building permit.

• • •

- 1.02 In the event an Employer covered by this Agreement engaged in the construction of an apartment building as herein defined, by means of a corporation, individual, firm, syndicate or association or any combination thereof, and where the Employer is the builder, it shall be deemed that the Corporation, individual, firm, syndicate or associ-

ation or combination thereof, is bound by the Agreement for the purposes of such construction work.

Each of the Employers agree that when engaged in the on-site construction of "low rise housing" they shall abide by the terms and conditions of the Collective Agreement between the Toronto Housing Labour Bureau and the Labourers' International Union of North America, Local 183.

The term "low rise housing" whenever used in this Collective Agreement shall be given the same meaning as that term is given in the Collective Agreement between the Toronto Housing Labour Bureau and the Labourers' International Union of North America, Local 183.

- 1.04 The terms and conditions of this Agreement are recognized only in Geographic Area No. 8 established and used by the Ontario Labour Relations Board in matters of certification:

The Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the town of Milton within the geographic Township of Esquesing and Trafalgar and the Towns of Ajax and Pickering in the Regional Municipality of Durham and the County of Simcoe.

- 1.05 The Employer recognizes that the Union represents and bargains for its members in various other sectors of the construction industry not covered by this Agreement, such as concrete forming, sewer and water main construction, road building, etc. Therefore, the employers hereby agree to recognize the Union as the bargaining agent in such sectors of the construction industry as it may from time to time become engaged in for its labourers and will meet with the Union in such events to agree on the appropriate applicable collective agreement for such work.

Schedule A

• • •

- A.6.1 Employees covered by this Agreement shall be all Construction Labourers employed in accordance with Article 1, 1.01 hereof, save and except employees employed as Operating Engineers, non-working Foremen, Watchmen, and Operators of Personnel hoists.

For the purposes of this Agreement, Construction Labourers shall be those employees engaged in construction work on residential construction projects being constructed by the Employer, and as defined in Article 1, 1.01 hereof, up to the takeover of the said construction project or part thereof by Maintenance and Management employees of the Employer, or Maintenance and Management employees of some other Employer.

For the purpose of clarification, Construction Labourers shall be generally those employees engaged in part, or all, of the following work or job functions, but shall in no way be limited to the following which is intended as a general description only:

Cleaning (all types)
 Material Handlers and Stockpilers
 Welders' Helpers
 Landscapers
 Salamander Heatersmen
 Flagmen
 Concrete Workers (except Concrete Finishers)
 Sheathing and Shoring Men
 Concrete Curers, Oilers, and Painters,
 Gradersmen, Timbermen, Temporary Fencing, Hoarding and Guard Rail Instal-
 lers, Handymen, Maintenance Men, Storemen, Gardeners
 Pipe Insulators
 Farm Tractor Drivers

20. In our view, Article 1.01 of the Housing Bureau Agreement and Article 1.01 of the MTABA agreement, which is incorporated by reference into the Housing Bureau Agreement, describes the intervener's bargaining rights with respect to the respondent. At best, article 1.05 does no more than preserve some (or perhaps all) of the bargaining rights granted to the intervener by the Board's certificate that have not been exercised in the Housing Bureau Agreement. However, by itself, it does nothing to add to those bargaining rights of the intervener which are in issue in this proceeding. We note that insofar as the employers, including the respondent, bound by the Housing Bureau Agreement have explicitly recognized the intervener as the bargaining agent for those employees doing the work covered by either agreement in the County of Simcoe, the scope of the Board's certificate has been exceeded and constitutes a voluntary recognition.

21. In Article 1 of the Housing Bureau Agreement, the employers who are bound by that agreement recognize the intervener as the bargaining agent of their "Construction Employees". However, that very broad term is restrictively defined in terms of the nature of work performed. Pursuant to Article 1.01(a), "Construction Employees" are those "(whose Classifications fall into a category listed in Schedule "A" attached hereto) engaged in the on site construction of all type of low rise housing only and their natural amenities ...". Article 6.01 of Schedule "A" goes on to define "Construction Employees" as being those who perform any or all of a series of listed work or job functions, all of which are, particularly in the industrial, commercial and institutional sector of the construction industry, commonly associated with construction labourers. In addition, unlike the Residential Housing Carpentry Agreement, to which the intervener is also a party and which is a collective agreement referred to in Article 1.03(a)(iii), the Housing Bureau Agreement makes no reference to carpenters or carpenters' apprentices and contains only one wage rate which applies to all of the work performed under it. In our view, the provision in Article 6.1 of Schedule "A" that the job functions listed "shall in no way be limited [thereto], which is intended as a general description only ..." at best means no more than that other work or functions similar in nature to those listed are also covered by the agreement. Consequently, the intervener is not, in our view, the bargaining agent for all "Construction Employees" of employers bound by the Housing Bureau Agreement but only for those employees of such employers in the listed and analogous classifications.

22. Except for bargaining units of or including operating engineers, it is the long-standing practice of the Board to describe bargaining units in the construction industry in terms of trades or crafts (for our purposes these terms are synonymous) rather than in terms of the work performed. This practice recognizes that trade union representation in the construction industry has traditionally been along trade lines and attempts to avoid interfering with established trade union work jurisdictions (see *Robertson-Yates Corporation Limited*, [1979] OLRB Rep. April 344; *Semple - Gooder Roofing Ltd.*, [1983] OLRB Rep. Nov. 1908). Unfortunately, the work jurisdictions of trades do overlap. In addition, as we have already noted, collective agreements in the construction

industry often identify the employees in the bargaining unit to which they apply in terms of the work they perform. As a general rule, there is no necessary congruence between the bargaining rights held by a trade union and its work jurisdiction. Consequently, a construction industry trade union does not necessarily have a general absolute right to a particular kind of work, even though that work may be performed by employees whom it represents (which in the construction industry usually means its members) pursuant to the terms of one or more collective agreements. The fact is that, in the construction industry, more than one trade union may have bargaining rights for employees who, though described in terms of different job categories, perform some of the same work. These overlaps give rise to competing claims for work between trade unions; that is, jurisdictional disputes (see for example *Toronto Star Newspaper Limited*, [1979] OLRB May 451). An application for certification is not the appropriate forum for settling such disputes or for determining the jurisdictional limits of trade unions (*Industrial Lighting and Contracting Limited*, [1979] OLRB Rep. Oct. 985). Further, because the Board's practice in the construction industry is to describe bargaining units in terms of trade rather than work performed, the mere fact that members of one trade union, pursuant to the terms of a collective agreement, perform work that members of another trade union perform as well (for other employers), does not mean that that collective agreement covers that other trade (see *The Frid Construction Company Limited*, [1975] OLRB Rep. March 146; *Graff Diamond Products* (Board File No. 2817-86-R) decision dated June 29, 1987, unreported).

23. Some of the work covered by the Housing Bureau Agreement is work which can be, and is, performed by either construction labourers, or by carpenters or carpenters' apprentices; that is, it is work over which both trades assert jurisdiction. In other words, some of the work covered by the Housing Bureau Agreement can be done by either members of the United Brotherhood of Carpenters and Joiners of America, (the "Carpenters") or by members of the Labourers' International Union of North America (the "Labourers"). It is both "labourers work" and "carpenters work". In such circumstances, the work being performed cannot be determinative of the trade of the person performing it; that is, it is not work belonging to the Labourers just because a labourer is doing it, nor is it work belonging to the Carpenters just because a carpenter or carpenter's apprentice is doing it. An employee is not a construction labourer merely because s/he is doing work that a construction labourer sometimes does if carpenters also perform that work as part of their trade. Consequently, the fact that members of the intervener sometimes perform work (for the respondent) that carpenters also do does not mean that the intervener represents all carpenters employed by the respondent.

24. In *Hashman Construction Limited*, [1973] OLRB Rep. April 205, the Board concluded that the MTABA agreement, as it then was, did not cover carpenters or carpenters' apprentices. There is nothing before the Board in this proceeding that persuades us that we should come to any different conclusion with respect to the present MTABA agreement insofar as its terms and conditions have been incorporated into the Housing Bureau Agreement. Further, we find that for the purposes of this proceeding the Housing Bureau Agreement does not apply to or cover carpenters or carpenters' apprentices in the employ of the respondent. In the result, we find that, in the context of the agreement as a whole, the Housing Bureau Agreement covers only construction labourers, not carpenters, who perform certain construction work on certain non-industrial, commercial and institutional projects, as specified in the agreement, in Board Area 8 and the County of Simcoe (which is part of Board Area 18). Accordingly, the Labourers do not have status to intervene in this application on the basis of the Housing Bureau Agreement.

25. The documentary evidence of membership filed by the intervener consists of 12 proof of membership documents. The documents contain the original signature of the members and indicate that they are members in good standing of the intervener. Eleven of the documents were

delivered to the Board on October 28, 1986, the terminal date fixed for this application, and indicate that the persons concerned had paid monthly membership dues for at least one month within the six month period immediately preceding the terminal date. The 12th document was submitted at the hearing on May 14, 1986, and indicates that the person concerned became a member of the intervener subsequent to the terminal date in this application and had paid membership dues for at least one month prior to the first day of hearing in this matter but for no month prior to the terminal date. The applicant objects to the Board receiving and relying on this last document on the basis that it is filed too late. While none of the other eleven relate to either the two individuals who all parties agree are properly on the list of employees to this application or to the five persons whose inclusion is disputed, the 12th document does relate to one of the five persons whose status is in dispute. Consequently, that latter piece of evidence is crucial to the intervener's assertion that it has status to participate in this proceeding.

26. Pursuant to section 73 of the Board's Rules of Procedure, a trade union seeking certification must file the membership evidence upon which it relies in support of its application on or before the terminal date fixed therefor. The Board will not accept membership evidence delivered subsequent to the terminal date. Where a trade union seeks to intervene in another trade union's application for certification, but does not itself seek to be certified, there is no provision in the Act or the Board's Rules of Procedure regarding the filing of any membership evidence upon which the intervention may be based. Any employee affected by an application is entitled to participate in the proceeding relating thereto either in person or through a representative. That is so even if such an employee gives no indication that s/he intends to participate prior to the hearing. In our view, the five individuals whose inclusion on the list of employees is in dispute are all persons affected by this application for purposes of ascertaining status to participate in the proceeding. Because one of those five is a member of the intervener, it too has status to participate. In our view, documentary evidence of membership upon which an intervention, such as the one in this proceeding is based, is filed in a timely manner so long as it is before the Board at the time that the issue of the intervenor's right to participate is being dealt with (*Chukini Lumber Company Limited*, [1970] OLRB Rep. April 63). Accordingly, we accept the document filed with the Board at the hearing on May 14, 1987 and on the basis thereof, we find that the intervener is entitled to participate in this proceeding.

27. This brings us to the issue of the status of the February 4, 1987 "agreement" between the applicant and the respondent with respect to the list of employees. We note that the Board's Rules and Procedures are structured in a manner designed to limit the ability of any party to gerrymander the list of employees or the structure of the bargaining unit. The respondent to an application for certification is required to provide the Board with a complete list of the employees in the bargaining unit proposed by the applicant on the date the application was made by the terminal date fixed for the application. A list of employees cannot be filed late, or amended once filed, without leave of the Board. However, the Board will generally permit a respondent to either file its list of employees, or amend a list that it did file to reflect new information not previously available or to correct errors that could not reasonably have been discovered beforehand, as late as the outset of the hearing (*Santa Maria Foods*, [1981] OLRB Rep. Nov. 1618; *Corecon Developments*, [1985] OLRB Rep. May 657).

28. In this case, the respondent filed a list of employees containing 7 names on Schedule "A" on the terminal date. Subsequently, the respondent met with a Labour Relations Officer (and the applicant and intervener) on two separate occasions specifically with respect to the list of employees and composition of the bargaining unit. During the course of the record of these meetings on February 4, 1987, the respondent specifically agreed, in writing, that the applicant's position with respect to the list of employees is correct and that 5 of the 7 names originally on the list

should not be on it. The respondent subsequently affirmed that agreement when it did not dispute the correctness of the Officer's report that contained the agreement and by letter dated February 27, 1987. It was not until more than three months after it signed the agreement that the respondent decided that it had "erred" and sought to resile from the agreement.

29. In our view, the circumstances under which the agreement was made and the respondent's subsequent actions (and inaction) make it wholly inappropriate for the Board to permit it to resile from that agreement (see *Harnden & King Construction Ltd.*, [1986] OLRB Rep. May 635). Accordingly, the Board declares that the applicant and respondent are bound by the terms of the February 4, 1987 agreement with respect to the list of employees. The Board will not entertain evidence or representations from either of them that are inconsistent with that agreement. Of course, the intervenor, which is not a party to that agreement, is entitled to maintain, as it has throughout, that the 5 individuals who the applicant and respondent have agreed are not in the bargaining unit should be on the list, until such time as the Board may determine that the individual who is a member of the intervenor should not be on the list and therefore is not affected by this application.

30. However, all of the parties have agreed on the appropriate bargaining unit description. Having regard to the agreement of the parties and the requirements of the Act, the Board finds, pursuant to section 144(1) of the Act, that all carpenters and carpenters' apprentices employed by the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices employed by the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

31. Under the circumstances, the Board authorizes a Labour Relations Officer, to be designated by the Registrar, to inquire into and report to the Board with respect to the list of employees in the bargaining unit.

32. The matter is referred to the Registrar.

0877-87-R Labourers' International Union of North America, Local 1036, Applicant v. **The Corporation of the City of Sault Ste. Marie**, Respondent v. R.E. Morcan, CUPE National Representative on behalf of Local 3, Canadian Union of Public Employees, Intervener #1 v. United Brotherhood of Carpenters and Joiners of America, Local 446, Intervener #2

Certification - Construction Industry - Practice and Procedure - Reconsideration - Counsel for respondent not attending certification hearing - Board certifying union - Respondent erroneously assuming that hearing would be adjourned based on conversation with Registrar in which Registrar told respondent to write in if it wished to amend its reply - Board denying reconsideration - Notice of hearing clearly setting out consequences of not attending hearing - Absence of counsel through his own false assumption not a ground for reconsidering decision

BEFORE: *R. A. Furness*, Vice-Chair, and Board Members *H. Peacock* and *W. H. Wightman*.

DECISION OF THE BOARD; October 9, 1987

1. In a decision dated August 7, 1987, the Board issued certificates to the applicant and intervener #2. The Board certified the applicant with respect to a bargaining unit described as follows:

all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman.

For the purpose of clarity, the Board noted the agreement of the parties "that this bargaining unit does not cover any of the non-construction activities (and specifically the maintenance activities) covered by the respondent's collective agreement with Local 3, Canadian Union of Public Employees". The Board also certified intervener #2 with respect to a bargaining unit described as follows:

all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman.

2. This application was filed on June 25, 1987, and the application for certification by intervener #2 was received by the Board on July 7, 1987. The hearing in this matter was held on August 6, 1987. The Notice of Hearing, Construction Industry, Form 79, which was sent to the applicant, the respondent, intervener #1 and intervener #2, is dated July 23, 1987. In addition, copies of the Notice of Hearing, Construction Industry, Form 79, were sent to counsel for the applicant, respondent and intervener #2. The Notice of Hearing, Construction Industry, Form 79, stated as follows:

1. **TAKE NOTICE** that the Board has directed a hearing of the application for certification of the applicant.

2. **AND FURTHER TAKE NOTICE** that the hearing will take place at the Board Room, 400 University Ave., Toronto, Ontario, M7A 1V4, on Thursday, the 6th day of August, 1987 at 9:30 o'clock in the forenoon (E.D.T.) and continuing on Friday, the 7th day of August, 1987 at 9:30 o'clock in the forenoon (E.D.T.)

3. The purpose of this hearing is to hear the evidence and representations of the parties with respect to all matters arising out of and incidental to this application and, without limiting the generality of the foregoing, specifically with respect to: (a) the bargaining unit description; (b) the list of employees and composition of the bargaining unit; (c) the matters raised in the respondent's reply; (d) the intervener's application for certification.

4. IF YOU DO NOT ATTEND AT THE HEARING, THE BOARD MAY PROCEED IN YOUR ABSENCE AND YOU WILL NOT BE ENTITLED TO ANY FURTHER NOTICE IN THE PROCEEDINGS.

DATED this 23rd day of July, 1987.

3. The panel of the Board which was scheduled to hear this case convened the hearing at the time, date and place set forth in the Notice of Hearing, Construction Industry, Form 79. Representatives and counsel for the applicant, intervener #1 and intervener #2 were in attendance before the panel. It was apparent that the respondent was not represented when the hearing was convened at 9:30 a.m. In accordance with its usual practice, the Board adjourned the hearing and inquired of the Registrar of the Board whether there had been any communication from either the representatives or counsel of the respondent regarding the hearing. The panel was advised that there had not been any communication of anticipated lateness or inability to attend the hearing from or on behalf of the respondent. The Board then waited until after 10:00 a.m. before commencing the scheduled hearing. The Board proceeded to entertain the representations before it and, as stated earlier, issued its decision on August 7, 1987.

4. On August 11, 1987, the Board received the following letter dated August 10, 1987:

I have been absent from the City of Sault Ste. Marie since late afternoon on August 4th last on business and returned to my office today. Upon my return, I was advised that a hearing in the captionally-noted matter was held on August 6th last and that the Labourers' and Carpenters' Unions have been certified pursuant to their applications.

I was unaware that the hearing was proceeding on August 6th as was my client, and I am herein applying to have the matter reopened and the hearing rescheduled.

The following is the sequence of events which occurred:

1. On July 24th two letters were received from the Ontario Labour Relations Board dated July 20th enclosing a copy of the Board's decision in the application by the Labourers' Union, Local 1036 and the application from the United Brotherhood of Carpenters, Local 446, stating that a hearing was to be directed.

2. As of that date, I had not received nor been aware of an application for certification by the Carpenters' Union.

3. It appears that the Board had rendered a decision in the Carpenters' matter prior to the application being sent to me or my client.

4. On July 29th I received under cover of July 23rd from the Ontario Labour Relations Board a letter acknowledging our reply to the certification by the Labourers' Union and enclosing amongst other things an application for certification filed on behalf of the Carpenters' Union, Local 446. Also, enclosed as Item No. C under cover July 23rd was a Formal Notice of Hearing, Construction Industry.

5. I turned my attention to the application for certification by the Carpenters' Union and noticed that my reply had to be in by July 31st. Because of the time element and the fact that my instructing principal from the City was away until August, I called Mr. Aynsley and requested time to file the Carpenters' Union reply until Friday, August 7, 1987. Mr. Aynsley advised that that would be satisfactory. I wrote to Mr. Aynsley under cover of July 29th formally confirming that I would file the Carpenters' Union reply by Friday, August 7th. At that time, no mention was made of a hearing on August 6.

6. In view of the above, I did not concern myself with reviewing the Notice of Hearing upon the erroneous assumption that there would not be a hearing until subsequent to the filing of our reply by August 7th.

7. On the same date, July 29th, I wrote a further letter setting out further objections to the Labourers' application.

8. On Tuesday, August 4th, I reviewed the Carpenters' Union application with my instructing

principal who had returned from holiday. On August 6th by puroletter our reply to the Carpenters' Union application was sent to the Ontario Labour Relations Board.

9. Friday, August 7th, my office was advised that the City had received a call from the Union stating that a hearing had been conducted on August 6th and no one appeared on behalf of the City and that the Unions have been certified. Needless to say, our clients are quite upset.

In reviewing this matter today, I have noticed that I had received on July 29th a formal Notice of Hearing for the Carpenters' Union application. As explained above, I did not review the Notice of Hearing at that time in view of the fact that arrangements had been made to file my reply to the Carpenters' Union application on August 7 and therefore erroneously assumed that there would be no hearing before then.

It would appear that at the time of your hearing on August 6th, the Board did not have in its hands the reply to the Carpenters' Union application. The Board made its decision without the benefit of even having our reply, notwithstanding that we had until August 7 to file our reply.

In view of the fact that the Board should have been aware that we would be filing our reply by August 7th which was confirmed in writing, it would seem to me that some enquiry of my office should have been made on August 6th prior to conducting the hearing.

I apologize for any inconvenience I may have caused, but I would submit with respect that the result in this matter is not fair to my client. As set out in our replies, there is a serious dispute to the applications and I submit that our client should have the benefit of a hearing before being certified.

I would be pleased to hear from you as soon as possible so that I can properly advise my clients.

5. On August 19, 1987, the Board received the following letter dated August 19, 1987, from counsel for intervenor #2. The letter states as follows:

We are in receipt of the Board's letter of August 13, 1987, enclosing letters from counsel for the Respondent.

We can, of course, make no comment on counsel's understanding of his telephone conversation with the Registrar. We note his confirming letter is dated July 29, 1987 and stamped as received by the Board on August 10, 1987. We can only express some surprise that counsel's earlier letter amending the list in the Labourers' application (also dated July 29, 1987), should have reached the Board in time for distribution to the parties on the morning of the hearing.

Nonetheless, counsel's letter quite candidly acknowledges his oversight, in not reviewing the Notice of Hearing in the application by the Carpenters' Union. Presumably he also had notice that the Labourers' application was scheduled for August 6, 1987. As well, I presume the Board served the Respondent with both Notices of Hearing.

The Board's Notice of Hearing is quite clear that parties failing to appear at a hearing do so at their own peril. We dispute counsel's assertion that the process is "not fair" to his clients. Once a date for trial or a hearing is set virtually every court and tribunal in the Province will proceed if one party fails to appear.

The assumption drawn by counsel from his alleged conversation with the Registrar were not, we submit, reasonable. He had notice of both hearings. Even if he failed to take notice of the Carpenters' application, he did have a notice of hearing in the Labourers' application and the Board's decision consolidating the two. He does not suggest he made any request for an adjournment or discussed the hearing dates with the Registrar. The extension to August 7th of the time to file the necessary reply ought not to have led him to conclude no hearing was or would be set. Although it is not good practice, respondents do occasionally file a reply and schedules of employees at a hearing.

We would refer the Board to a decision involving an application for certification by another

Local of the United Brotherhood of Carpenters and Joiners of America, *Monte Carlo Carpentry*, [1982] June p. 914. In that case one of two competing unions was not advised of a hearing or indeed of the certificate issued to the other union due to an "administrative error" on part of the Board. When it later inquired of the Board as to what had happened, it was advised of the facts and sought to have the Board reconsider its decision. This request was denied, partly because of prejudice to the other union, partly because of a responsibility of a party to diligently pursue its application, even in the face of an admitted administrative error. We submit the same responsibility rests on the Respondent in this case.

There is also substantial prejudice to the Carpenters' Union in permitting the Respondent to prolong the process at this point. We took certain positions with respect to the list of employees in the bargaining unit at the hearing on August 6th based on the information available at that time. As the Board is aware, as a result of the manner in which the case developed during the hearing, we withdrew the companion application for certification in Board File 0952-87-R. Had different facts emerged we might well have taken a different position with respect to that application and the Board's decision of July 17, 1987. Since we have taken positive steps in these proceedings it can only be to our prejudice to permit the Respondent to recommence the hearings at this time.

We respectfully request the Board to deny the Respondent's application.

6. On August 24, 1987, the Board received the following letter dated August 21, 1987, from counsel for the respondent. The letter states as follows:

We acknowledge receipt of the following:

1. under cover dated August 19, 1987, a copy of the Board's Decision in the above matter, together with a copy of the Certificates issued by the Board;
2. your letter of August 19, 1987, acknowledging receipt of our August 6th letter; and
3. a copy of a letter from Messrs. Caley & Wray to Ms. Virginia Robeson, dated August 19, 1987.

I wish to make reply to some of the comments made by Mr. McKee of the Caley & Wray firm.

Mr. McKee states that we also had notice of the Labourers' application date of hearing. The Board ordered that the Labourers' and Carpenters' applications herein be heard together, and I therefore assumed that both matters would be set for hearing together after we had filed our Carpenters' application reply by August 7th as directed by Mr. Aynsley.

Mr. McKee states that my assumptions that the hearings would not proceed was [sic] not reasonable, without giving any reasons why that assumption would not be reasonable. It is not only reasonable but necessary for the Board to have the filing of the reply to an application for certification prior to the commencing of the hearing. If the reply, with consent of the Board is not being filed until August 7th, the only logical consequence that follows is that the hearing will proceed subsequent to August 7th.

Mr. McKee states that occasionally respondents file a reply at a hearing. We were given until August 7th to file our reply wherein the hearing proceeded on August 6th. That statement therefore does not advance his cause in any way.

The *Monte Carlo Carpentry* case that Mr. McKee refers to has a totally different set of facts. First of all, the complaining party was not the party being certified. Secondly, and more importantly, the complaining party was not put in the position by the Registrar leading to the mistaken assumption that no hearing was being proceeded with prior to the filing of the necessary reply. Thirdly, in this case, the Board would not and did not have even the benefit of the City's reply before it at the time of the hearing, because of the direction that the reply could be filed on August 7th.

Mr. McKee further states that there would be prejudice to the Carpenters' Union. I do not understand what happened in regards to that application. I am in the possession of an order certifying the Carpenters, dated August 7th and another order dated the same date granting the Carpenters permission to withdraw their application.

The City is taking the position that the employees listed in both the Labourers' application and the Carpenters' application were doing carpentry work and not labourers' work. The reply to the Carpenters' application sets out these facts.

In my discussions with Mr. Aynsley, I advised that we wished to amend our reply to the Labourers' application. Mr. Aynsley advised that there would be no problem and simply to write a letter to the Board with our amendments. These letters were sent on July 29th at the same time of our letter confirming that we would be filing our Carpenters' reply by August 7th.

I have since been advised by you that my letters did not reach the Board until sometime after August 10th.

In view of my conversations with Mr. Aynsley, I do not see why my client should suffer the consequences of the delay in material reaching the Board when the Registrar was aware that these letters were on the way.

I presume that Mr. Aynsley did not advise the new Registrar or make any notes in the file because he believed my letters would be there prior to August 6, which they should have been.

I am quite surprised that Mr. McKee would be taking the position they are when it seems to me that simple fairness in all the circumstances requires a hearing.

7. On August 25, 1987, the Board received the following letter dated August 24, 1987, from intervenor #1. The letter states as follows:

I acknowledge, with thanks, receipt of your letter regarding the above-noted Applications for Certification.

I would like to point out to the Board that your letter is the first knowledge of confusion regarding a request for a postponement made by the Respondent that the Intervener is aware of.

As the Intervener in this case, at no time was I made aware that such a request had been made, nor was I contacted for permission to agree to a change of date. In the past, it has always been the practise of the Board to contact all parties involved when a change of hearing date has been made. Certainly in this particular case there was no agreement of the parties for postponement of the hearing as far as the Intervener is concerned.

It is the position of the Intervener that to reschedule a hearing at this point would jeopardize the interests of the employees who are seeking union representation.

If it became a practise that a Respondent, in order to get an application for certification hearing delayed, simply did not attend a scheduled hearing and later requested a re-hearing, the whole field of labour relations would end up in turmoil.

By signing membership cards, these employees have demonstrated that they wish union representation. All parties in attendance at the hearing on August 6th, 1987 were satisfied that the employees were entitled to be certified and therefore, all of the requirements for certification have been met.

8. On August 27, 1987, the Board received the following letter dated August 27, 1987, from counsel for the applicant. The letter states as follows:

We acknowledge receipt of letters dated August 13th and 19th, 1987 from the Board enclosing various letters from solicitors for the Respondent. It appears that the Respondent essentially seeks, pursuant to Section 106 of the Act, to have the Board reconsider its decision dated

August 7, 1987 ("the Decision") certifying both the Labourers and the Carpenters for their respective craft units in the employ of the Respondent in the construction industry and requests the Board to "...have the matter reopened and the hearing rescheduled". On behalf of our client, we oppose any such request for reconsideration for the following reasons:

1. As we understand the correspondence from counsel for the Respondent, it is *not* disputed that both counsel and the Respondent had notice of the hearing scheduled for August 6, 1987. Although the correspondence refers to discussions between counsel for the Respondent and the Registrar of the Board, there is *no* suggestion that the Respondent requested the adjourning or cancelling of the hearing scheduled for August 6th or that the Registrar in any way conveyed or suggested that the hearing would not proceed. Certainly, neither we nor our clients were ever approached about, let alone consented to, the adjourning of the hearing scheduled for August 6, 1987. Needless to say, our clients attended the hearing on August 6, 1987 at considerable expense and inconvenience as well as summoning a witness who also attended. In fact, all parties, including both Intervenors, attended with the sole exception of the Respondent. The Board waited its customary half hour before proceeding. In fact, at our request, we understood the Board attempted to contact both the Respondent and counsel but was unable to do so. In accordance with its customary practice, the Board then proceeded to hear and dispose of the Applications for Certification on the basis of the evidence and agreement of the parties before it. The Respondent now seeks reconsideration of the Decision on the basis of its own failure to attend at the hearing.
2. Reconsideration requests due to the failure of a party to either file a reply or attend at a hearing are not novel. To avoid this problem, paragraph 4 of the Notice of Hearing (which is not disputed was received by both counsel and the Respondent) sets forth in bold print and in capital letters:

"4. IF YOU DO NOT ATTEND AT THE HEARING, THE BOARD MAY PROCEED IN YOUR ABSENCE AND YOU WILL NOT BE ENTITLED TO ANY FURTHER NOTICE IN THE PROCEEDINGS."

As a result, it has been the consistent practice of the Board not to reconsider or reopen its decision merely because of the failure of a party to attend the hearing when it has had notice of such hearing. In *Johnsons Painting Co. Ltd.*, [1983] OLRB Rep. June 919, the Board, in refusing a request for reconsideration, stated at para. 32:

"The construction industry provisions of the *Labour Relations Act* and the regulations under the Act clearly indicate a Legislative intent that construction industry certification applications be processed quickly. This, together with the need for finality in Board proceedings, strongly mitigates against granting requests to re-open a certification proceeding unless there are compelling grounds to do so..."

See also *Coldmatic-Refrigeration of Canada Ltd.*, [1985] OLRB Rep. June 1009 where the Board in refusing to reconsider and re-open its determination of a construction industry grievance, stated at para. 15:

"...the Board cannot encourage a practice whereby one party can, being aware of the scheduling of proceedings, choose to not attend and then, after discovering that the award has been made against him, seek to reopen the proceedings when no compelling reason to do so has been presented."

These cases are by no means unusual or unrepresentative. For other cases where reconsideration has been refused in similar circumstances, see also *A.J. Fish & Son Limited*, [1982] OLRB Rep. August 1123; *Karvon Construction Limited*, [1982] OLRB Rep. August 1186; *Ferano Construction Ltd.*, [1985] OLRB Rep. January 73; *Brantco Construction* [1986] OLRB Rep. January 6; *Marble Arch Investments Limited*, OLRB File No. 2957-86-R, unreported decision dated May 27, 1987.

In *M. Sullivan and Son Limited*, [1979] OLRB Rep. January 58, the Board refused to entertain a subsequent complaint under Section 89 of the Act where a previous identical complaint had

been dismissed following the non-appearance of the complainant. The Board set forth its policy with respect to reopening cases where one of the parties failed to attend at paras 18. and following:

18. When scheduling hearings for all applications before it, including Section 79 [now Section 89] complaints, the Board is mindful of the fact that in labour relations matters speed is generally of the essence and that delay may cause serious prejudice to one or other of the parties. Because of this, the Board's practice upon receiving an application or complaint is to schedule a hearing in the manner for a fixed time and then to inform the parties of the date set. Variations from this date will generally be allowed only on agreement of the parties or if one party cannot attend on that date due to circumstances beyond its control.

19. In a fairly large number of cases the Board has been asked by respondent employers not to proceed with a hearing into a Section 79 [now Section 89] complaint on the date scheduled but rather to adjourn the hearing to some later date. Unless the Respondent could demonstrate that it could not attend on the dates set for reasons beyond its control, the Board has almost invariably refused these requests. If on the date set for hearing the employer failed to appear, or if it appeared it was only to ask without success for an adjournment and then withdrew, the Board has generally proceeded to inquire into the complaint notwithstanding the absence of the employer and, where warranted, issued a decision in favour of the complainant...

21. Doubtless the Board's manner of scheduling hearings and then declining to vary the dates selected except in exceptional circumstances cause some degree of inconvenience to all the parties that appear before it. Nevertheless, this procedure has the effect of keeping delays in the commencement of hearings to a minimum. This, we believe, is of great benefit in the administration of The Labour Relations Act. Not only does it allow the Board to handle all applications in a more orderly and hence in a more expeditious manner, but it also eliminates at least one possible source of delay in Board proceedings. Having regard to the fact that the Board generally deals with situations where delay will cause prejudice, it is our opinion that this manner of proceeding is conducive to the general well-being of sound labour relations in the province.

22. *One result of the Board's system of scheduling hearings is that parties must take care both to ensure that the hearing dates are not missed and also that they have properly prepared themselves for the hearing, which includes ensuring the attendance of essential witnesses.*

23. Where a complainant has had a Section 79 [now Section 89] complaint dismissed due to its non-attendance at a hearing, or a respondent has had a finding made against it notwithstanding its absence from the hearing, we are of the view that having regard to the considerations set out above the absent party bears the onus of showing grounds where the subject matter of that complaint should later be inquired into. This could be done in just about every case by showing that its failure to attend was occasioned [sic] by factors beyond its control. Where this was not the case, however, then a careful weighing of a number of considerations must be undertaken.

24. *One such consideration is the reason for the party's non-attendance at the original hearing. In the instant case we are of the view that the most likely cause of the complainant's non-attendance was inadvertence on the part of its business representative. Inadvertence, however, is not a particularly strong ground for relief. Further, although the inadvertence was not the fault of the grievors, by having the complainant act as their agent in bringing the initial complaint the grievors did put themselves in a position where their rights might be affected by the negligent acts of the complainant...*

26. *In the interest of sound industrial relations policy and the orderly administration of the Act, we are of the view that parties must take care to ensure they attend the scheduled Board hearings. We are also of the view that where a complaint is dismissed because of a failure of a complainant to attend at the hearing, or a complaint is upheld*

in the absence of the respondent, as a general principle the Board should not permit the subject matter of the complaint to be reopened unless sufficient grounds for so doing have been advanced by the absent party..."

[emphasis added]

3. What appears to be the reason advanced by counsel for the respondent is the failure of both counsel and the Respondent to carefully read the Notices of Hearing which were received. Even if the error was solely counsel's (and it appears the error was also that of the Respondent), as suggested in *M. Sullivan and Son Limited*, supra, the Board has consistently refused to allow a party to rely on the error of its counsel or agent to the detriment of the other innocent parties.

The Board policy has been clear since the seminal decision in *Addressograph-Multigraph of Canada Limited*, [1968] OLRB Rep. March 1183, where the Board stated at the para. 17:

"17. While counsel for the Intervenor argued that his client should not be saddled with his mistake or the mistake of his employee, the Board is of the opinion that a client must assume responsibility for the mistake of his solicitor. It cannot seriously be argued that legal counsel can make mistakes with impunity or that their mistakes do not carry the same weight as similar mistakes made personally by a party. We are of the view that counsel's responsibilities are no less onerous than the responsibilities imposed upon a party in any proceeding and a party cannot evade the results of mistakes made by counsel retained by the party."

See also *Soo Dairies Limited*, [1968] OLRB Rep. April 115, *Canadian Union of General Employees*, [1975] OLRB Rep. April 320, *Adventure Construction Limited*, [1975] OLRB Rep. April 371, *Sheller-Globe of Canada Ltd.*, [1982] OLRB Rep. January 113 at para. 12. In particular in both the *Soo Dairies Limited* and *Canadian Union of General Employees* cases, in circumstances similar to these, the Board refused to reconsider or re-open cases where counsel for one of the parties failed to attend the hearing through error.

4. Furthermore, nothing in the Respondent's submissions come within the ambit of the Board's general jurisprudence to exercise its discretion to reconsider a decision. That general jurisprudence was summarized at para. 11 of the *Canadian Union of General Employees* case, supra:

"11. Generally, the Board will not reconsider a decision unless a party proposes to adduce new evidence which could not previously have been obtained by reasonable diligence and the new evidence is such that, if adduced, it would be practically conclusive or a party wishes to make representations or objections not already considered by the Board that he had no opportunity to raise previously. (*International Nickel Co. of Canada Ltd.* [1963] OLRB Rep. 234, 64 CLLC para. 15,493 (Ont. H.C.); *Detroit River Construction Case* (1962) CLLC para. 16,260). Both legs of this principle depend upon the applicant having been diligent [sic] and therefore having no opportunity to draw the Board's attention to the object of its concern. *The applicant in the case at hand and his lawyer were not diligent in that they were given notice of the hearing date in the matter by the Board.* Accordingly, they would not appear to come with [sic] the ambit of the principle." (emphasis added)

Both the circumstances and rationale of the *Canadian Union of General Employees* cases are indistinguishable from the submissions made by the Respondent.

For all of the foregoing reasons, we request that the Board dismiss the Respondent's request for reconsideration and not re-open this case.

9. On September 2, 1987, the Board received the following letter dated September 1, 1987, from counsel for the respondent. The letter states as follows:

Receipt is acknowledged of a copy of the letter to you from Koskie and Minsky, solicitors for the Carpenters, Local 446. [sic]

1. In Paragraph 1, it is stated that there is no suggestion that the Respondent requested the adjourning or cancelling of the hearing or that the Respondent in any way suggested that the hearing would not proceed.

I do not agree with that representation. It was implicit, in obtaining the extension for filing the Reply until August 7th, coupled with the Board's order that the Labourers' and Carpenters' hearings herein be heard together, that the hearings would be scheduled after August 7th.

As I have stated in my earlier correspondence, because of the fact that we received an extension for our Reply and additional objections to the Labourers' application, I did not concern myself with ascertaining the date for the hearing assuming that a date would be arranged subsequent to August 7th.

2. In all of the cases referred to by counsel, the Respondents either chose not to appear or did not appear through internal confusion. In no cases cited by anyone was the Respondent put in the position of believing that the hearing would not be proceeding within the time period allowed for the filing of a reply by the Registrar of the Board.

3. In Paragraph 3, counsel states that the reason for the Respondent failing to appear is the failure to carefully read the Notices of Hearing. This once more is incorrect. Counsel did not read the Notices of Hearing because of the representation of the Registrar of the Board extending the time periods.

4. Counsel for the Carpenters cites the *Canadian Union of General Employees* case wherein it is stated that the Board would not reconsider a decision unless a party wishes to make representations or objections not already considered by the Board that he had no opportunity to raise previously.

The Board proceeded with the hearing of this matter prior to receiving our Reply to the Carpenters and new objections to the Labourers. Mr. Aynsley was advised of both of these matters by telephone at the same time as he authorized the extension of the filing of our Reply and new objections until August 7th. Because of the arrangement with Mr. Aynsley, the Board did not have our written replies or evidence, or verbal submissions at the time of the hearing.

5. In my respectful submission, there was a denial of natural justice in all of the circumstances which should allow the Board to reopen the hearing.

Thank you for your consideration.

10. The Board has not received further correspondence from either the applicant or the respondent or the interveners.

11. The Board notes that the respondent has not requested any relief with respect to the Board's File No. 0952-87-R. The application therein was withdrawn by leave of the Board. The decision is dated August 7, 1987.

12. The Board notes that the respondent received the notice of hearing on July 29, 1987. There was no suggestion that the Board in fact changed the hearing dates to suit the convenience of counsel for the respondent. The Board's Rules of Procedure set forth the requirements for filing a reply. Reference is made to section 93 of the Board's Rules of Procedure. As counsel for the respondent stated, he erroneously assumed that a hearing would not be held before August 7, 1987. There is nothing in the material before the Board to indicate that this erroneous assumption originated anywhere other than in the mind of counsel for the respondent. The wording of the Notice of Hearing, Construction Industry, Form 79, referred to in paragraph 2 herein, is clear and precisely sets forth the consequences of not attending the hearing. The applicant and the interveners did

attend the hearing together with representatives and witnesses from Sault Ste. Marie. No doubt this was accomplished at some expense to these parties. While the respondent may wish to file a reply there is no requirement that a reply be filed. A party which files a document beyond the purview of the Board's Rules of Procedure does so at its peril. The Board did not authorize an extension of the time for filing a reply by the respondent.

13. Counsel for the respondent admits a mistaken assumption and states that simple fairness is required. The concept of simple fairness is more than a subjective assessment of the consequences of a false assumption and the feelings of a client who is "quite upset". The concept of simple fairness must surely be an objective assessment of all the circumstances such as the reasonable and legitimate expectations of the applicant and intervener #2 under the administration of the *Labour Relations Act*. The applicant and intervener #2 commenced proceedings under the *Labour Relations Act* and attended a scheduled hearing in order to obtain the remedies they sought. In labour relations, time is of the essence. This is particularly so with respect to applications for certification which are filed under the construction industry provisions of the *Labour Relations Act*. For example, upon certification employees who are covered by a provincial collective agreement in the industrial, commercial and institutional sector of the construction industry are immediately entitled to benefits under that provincial collective agreement, such as, for example, wages and health, welfare and pension benefits.

14. It appears to the Board that an error based upon an unwarranted and false assumption by counsel for the respondent led to the failure of counsel to attend before the Board on August 6, 1987. As the Board held in *Addressograph-Multigraph of Canada Limited*, [1968] OLRB Rep. March 1183, counsel's responsibilities are no less onerous than the responsibilities imposed on a party in any proceedings and a party cannot evade the results of mistakes made by counsel retained by a party. The Board has made its decision after a hearing held after sufficient and adequate notice to all parties of such hearing. The Board is not prepared to reconsider its decision in this matter. The absence of counsel through his own false assumptions is not a ground for reconsidering a decision of the Board pursuant to section 106(1) of the *Labour Relations Act*. The Board notes that the respondent has not alleged that it had new evidence which could not previously have been obtained by reasonable diligence and that such evidence, if adduced, would be practically conclusive as contemplated in *Canadian Union of General Employees*, [1975] OLRB Rep. April 320.

15. For the foregoing reasons, the requests of counsel for the respondent are denied. The Board affirms its decision in this matter dated August 7, 1987, and the certificates that were issued thereunder.

1181-87-R United Brotherhood of Carpenters and Joiners of America, Local 27, Applicant v. Strongland Construction Ltd., Respondent

Certification - Construction Industry - Evidence - Practice and Procedure - Challenge to officer's ruling that respondent limited to introducing evidence relating to the work of the employees on the application date - Appropriate time for dealing with such matters is after the officer's report is received - Officer directed to continue with enquiry

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *D. A. MacDonald* and *J. Redshaw*.

DECISION OF THE BOARD; October 16, 1987

1. By letter dated October 2, 1987, counsel for the respondent submits that the Labour Relations Officer authorized by the Board to enquire into and report to the Board with respect to the list and composition of the bargaining unit has wrongly ruled that:

"In conducting the enquiry into the question of whether or not Company employees were carpenters and to be included in the bargaining unit applied for he would limit the company to introducing evidence relating to the work of the employees on the application date."

Counsel requests that the Board either direct the Officer to permit the respondent to adduce evidence of the activities of the persons concerned prior to the date of application, or, in the alternative, that the Board convene a hearing to deal with that evidentiary matter.

2. The procedure relating to enquiries conducted by Labour Relations Officers is set out in Board Practice Note #4. For matters not specifically dealt with by Practice Note #4, the appropriate procedure to follow is by analogy to it. Practice Note #4 contemplates that all parties be given an opportunity to examine those witnesses whom they choose to call and to cross-examine those witnesses called by another party or who are initially examined by the Officer. We observe also that the Officer's ruling, as set out by counsel for the respondent, does not preclude the respondent from adducing evidence with respect to those persons whose inclusion on the list of employees herein is in dispute for days other than the date of application so long as that evidence is arguably relevant to that issue.

3. In our view, Board Practice Note #4 provides an adequate mechanism for dealing with the concerns raised by the respondent in this case, and it would not be appropriate for the Board to depart from its usual practice in such matters in either of the ways suggested by it. To accede to the respondent's request would be to invite objections and requests for rulings which would ultimately serve to do little more than cause further delays in the certification process. The appropriate time for the Board to deal with such matters is after it has received the Labour Relations Officer's report and the submissions of the parties with respect thereto. Accordingly, the respondent's request is denied and the Board Officer is directed to continue with his enquiry.

1225-87-R Labourers' International Union of North America, Local 1059, Applicant v. **Thornton Sand & Gravel Limited**, Respondent v. Group of Employees, Objectors

Certification - Construction Industry - Petition - Document bearing foreman's signature and signed at the request of the foreman not a voluntary statement of desire - Certificates issuing

BEFORE: *Robert D. Howe*, Vice-Chair, and Board Members *J. Trim* and *L. C. Collins*.

APPEARANCES: *L. A. Richmond*, *J. MacKinnon*, and *M. Claro* for the applicant; *Stuart M. Ducoffe*, *Edward V. Johnson*, and *Gordon C. Pullen* for the respondent; *Robert Taylor* for the objectors.

DECISION OF THE BOARD; October 20, 1987

1. This is an application for certification within the meaning of section 119 of the *Labour Relations Act*, and is made pursuant to section 144(1) of the Act.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the Act, and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on April 21, 1978, as amended on July 13, 1978, and September 6, 1978, the designated employee bargaining agency is The Labourers' International Union of North America and The Labourers' International Union of North America Ontario Provincial District Council.

3. Having regard to the agreement of the parties, the Board finds, pursuant to section 144(1) of the Act, that all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

4. In accordance with the Rules of Procedure respecting applications for certification, the respondent (also referred to in this decision as the "Company") has filed a list of employees in the bargaining unit as of July 31, 1987, the date on which this application was filed. That list, as revised at the hearing of this matter, contains five names. The first name on the list is "Manuel Lima". Mr. Lima is classified by the respondent as a foreman. The applicant (also referred to in this decision as the "Union") challenges his inclusion on the list on the grounds that he exercises managerial functions within the meaning of section 1(3)(b) of the Act. The objectors, on the other hand, agree with the respondent's position that Mr. Lima is properly included on the list.

5. As indicated by the Board at the hearing of this matter, regardless of whether Manuel Lima is included in or excluded from the bargaining unit, the Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on August 14, 1987, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

6. The objectors have filed a statement of desire (referred to in this decision as the "peti-

tion”) in opposition to the applicant being certified. That document, which was filed with the Board in a timely manner, contains thirteen signatures, including the signatures of two employees who earlier signed membership cards. The petition is of potential relevance to the exercise of the Board’s discretion under section 7(2) of the Act, because if the petition is voluntary, it would raise sufficient doubt concerning the continued support for certification of the applicant by a sufficient number of employees who also signed membership cards that the Board would generally exercise its discretion under section 7(2) to direct that a representation vote be taken despite the fact that more than fifty-five per cent of the employees in the bargaining unit were members of the applicant at the relevant time. Accordingly, the Board conducted its usual inquiry into the origination and circulation of the petition, and afforded each of the parties an opportunity to adduce evidence and present argument concerning the petition.

7. The petition was typed by John Davis, who is employed by the respondent as a loader operator. It was his evidence that he obtained the wording of the petition from material posted on the shop bulletin board by Gordon Pullen, the Vice-President of the respondent. It is unclear from the evidence whether that material consisted solely of the Board’s (Form 78) Notice to Employees of Application for Certification, Construction Industry, and the Board’s “Notice to Employees” which accompanied it, or whether those two documents were supplemented by the respondent. Mr. Davis typed the petition at home on the evening of August 11, following a meeting attended by a number of employees at the shop after working hours.

8. On the following morning, Mr. Davis brought the petition to the respondent’s shop and handed it to Ted Siemiernik, a machine operator, who signed it in the presence of Robert Taylor, a truck driver in the employ of the respondent. Mr. Taylor and six other employees also signed the petition that morning in the shop before starting work. It was then taken by Mr. Siemiernik, who was supposed to be working at a site in Woodstock commencing at seven o’clock that morning. Instead of proceeding directly to that site, Mr. Siemiernik went to a job site in Ingersol for the sole purpose of obtaining additional signatures on the petition. Upon arriving at the Ingersol site, he spoke with Manuel Lima, the aforementioned foreman, and explained to him that he was there to get signatures on a petition against the Union. In his testimony before the Board, Mr. Siemiernik confirmed that Mr. Lima is a foreman who has a crew of labourers working under him. It was also Mr. Siemiernik’s evidence that Mr. Lima gives him orders from time to time. Mr. Lima’s authority to direct the work force was also confirmed by Mr. Taylor, who testified, “When I’m working on a job, I take my orders from him.”

9. After reading the petition, Mr. Lima gave it to Jose Mauricio, one of the labourers employed on the Ingersol job site, and told him (in Portuguese) to sign it. Mr. Mauricio had been hired by Mr. Lima, and perceived Mr. Lima to be a “boss” who was in charge of the job. He was also of the view that Mr. Lima had the power to discharge him. Mr. Mauricio signed the petition because he had heard that the Company did not want the Union and was afraid that he would lose his job if he did not sign. After Messrs. Lima and Mauricio signed the petition, Mr. Siemiernik brought it to two other workers on that site (including another of the labourers on the employer’s list) and obtained their signatures. Mr. Siemiernik then left that site and drove to a different site to obtain another signature, after which he returned to the shop at approximately 8:15 a.m. and gave the petition to Mr. Taylor. Mr. Siemiernik then proceeded to his job site in Woodstock, and arrived there an hour and a half after his normal 7:00 a.m. starting time. Mr. Siemiernik’s job does not normally involve driving from site to site, except when he completes his work at one site and is required to move to another site. He told the Board that if he was going to take some time off work to attend to personal business, he would normally have to let someone know. However, he “didn’t feel it was necessary” that day because he was “not particularly [worried]” about management finding out what he was doing.

10. After the petition had been returned to the shop, Mr. Davis went to the respondent's office to obtain an envelope from Allan Hill, the respondent's estimator. Mr. Davis then telephoned Sandy Thornton, the daughter of the respondent's President, and asked if he could use her typewriter to type the envelope. Ms. Thornton, who in the words of Mr. Davis "kind of knew what it was all about", readily agreed to permit him to do so. Mr. Davis then left the shop and went to Ms. Thornton's residence, where he typed the envelope. Mr. Taylor used that envelope to mail the petition to the Board later that day while he was out picking up parts for the respondent.

11. In describing the legal basis and effect of petitions, and the Board's practice in respect of them, the Board wrote as follows in *Elks Inc.*, [1985] OLRB Rep. Feb. 244:

8. The system of certification prescribed in Ontario by the *Labour Relations Act* rests primarily upon an assessment of the union's membership support based upon an examination of its documentary evidence of membership. Upon showing the requisite membership support, the union is "certified" or granted a licence to bargain on behalf of a group of employees - subject, of course, to their right to file a timely application terminating bargaining rights. The Board does not solicit *viva voce* opinions about the virtues of trade union representation (see Rule 73(2)), nor, in this jurisdiction, is a representation vote the primary vehicle for achieving the right to represent employees. That right depends upon the solicitation of a sufficient number of membership cards authorizing the union to act as bargaining agent, and to protect employees from possible employer reprisals that anonymity of the union supporters is preserved. That is the way it has been for more than thirty years, and doubts about how the Board should go about its task have frequently been resolved by amending the statute (as, for example, to resolve the question of what is a "union member" and the "question" the Board was to ask itself in this regard which prompted section 1(1)(l)). There is now an elaborate statutory and regulatory framework governing union membership evidence, as the Board has sought to apply sections 1(1)(l) and 103(2)(j) to the special circumstances of particular cases.... Representation votes are a residual mechanism resorted to where the union cannot demonstrate a "clear majority" (i.e., more than fifty-five per cent) or where, in the Board's discretion, a representation vote should be held in the particular circumstances of a case. One of those circumstances is a purported change of heart by employees who have previously signed union membership cards.

9. On the other hand, neither the Legislature nor the Board has taken a myopic view of the realities of the situation. Employees can and do change their minds. While in some jurisdictions the statute precludes or inhibits such expressions so that certification is based solely on membership cards, and in others they are irrelevant because the preferred method of testing employee wishes is a representation vote, Ontario has evolved a middle position recognizing the validity of union membership cards, but retaining some flexibility to seek the confirmatory evidence of a representation vote where employees have put before the Board a timely "petition" or other document indicating a change of heart. Petitions too have been part of the certification process for decades.

10. The Board recognizes that "statements of desire" (see Form 6), usually in the form of a "petition", are not regulated by the Act as directly or precisely as union membership evidence. There is no statutory definition equivalent to section 1(1)(l), nor is there any requirement for a monetary payment, in the nature of consideration confirming the act of signing. There is no statutory declaration similar to Form 9 attesting to the regularity and sufficiency of the membership evidence. There is usually no confirmatory signature of a subscribing witness. Nevertheless, the existence of such statements appears to be contemplated by section 103(2)(j) of the Act and Rule 73 of the Rules of Practice. And, in any event, as we have already noted, the Board has a long-established practice of accepting such petitions and exercising its discretion to order a representation vote where: the petition is voluntary (as evidenced by testimony adduced in accordance with Rule 73 of the Rules of Practice), and the petition contains the signatures of a sufficient number of persons who have previously signed membership cards that there is some doubt whether these "members" (in accordance with section 1(1)(l)) continue to support the union's certification.

11. The Board must be satisfied, however, that when these union supporters sign the petition indicating an apparent change of heart, they were doing so voluntarily, and were not motivated

by a perceived threat to their job security or a concern that their failure to sign would be communicated to their employer, or could result in reprisals. It must be clear that the circulation of the petition is free from the actual or perceived influence of management. Often, as in the present case, a petition will be signed by employees who have indicated their support for the union only a short time before, and a natural question arises as to what prompted the change of heart. Was it prompted by a reappraisal of the value of collective bargaining, or by a reluctance to identify oneself as a union supporter when presented with a petition document? While an employee can be reasonably assured that his support for the union will not be communicated to his employer, he may have no such assurance concerning his refusal to sign a petition opposing the union.

See also *Conference Cup. Co. Ltd.*, [1986] OLRB Rep. Jan. 2; *Ontario Hospital Association*, [1980] OLRB Rep. Dec. 1759; *Lyman Tube*, [1980] OLRB Rep. Oct. 1472; and *I.M. Pastushak Ltd.*, [1980] OLRB Rep. July 979.

12. In the instant case, the only signatures which are pertinent to the exercise of the Board's discretion are those obtained by Mr. Siemiernik at the Ingersol job site which he visited on the morning of August 12. The persons who signed the petition in the shop earlier that morning, including Mr. Taylor, Mr. Davis, and Mr. Siemiernik himself, were not labourers. Thus, they are not included on the employer's list and will not be in the bargaining unit if this application is granted (unless they come to be employed as labourers by the respondent at some point in the future). Having regard to all of the evidence and the submissions of the parties, we have concluded that it has not been established on the balance of probabilities that any of the labourers who signed the petition did so voluntarily. As indicated above, Mr. Siemiernik, who was supposed to be working at a job site in Woodstock, went to the Ingersol job site for the sole purpose of obtaining signatures on the petition. Upon arriving at the job site, he spoke with Mr. Lima and explained to him that he was there to get signatures on a petition against the Union. As noted above, Mr. Lima is a foreman who has a crew of labourers working under him. He gives orders to them and to other employees on the site. Mr. Mauricio, who signed the petition at Mr. Lima's direction out of fear that he would lose his job if he did not sign, was hired by Mr. Lima and was of the view that Mr. Lima, whom he referred to (in his testimony before the Board) as his "boss", had the power to discharge him. As noted by the Board in *Leamington Vegetable Growers' Co-operative Limited*, [1974] OLRB Rep. June 402, in paragraph 9 "[i]n the work place, the word 'boss' surely connotes, in the clearest and most unequivocal way, superior authority." In the circumstances of this case, it is reasonable to infer that the other persons who worked under Mr. Lima, including the other labourer who signed the petition, had a similar perception regarding his authority over them. In signing that document, which already bore his foreman's signature and which was presented to him by an employee who had come during working hours to the Ingersol job site solely to obtain signatures on the petition, that labourer would reasonably have perceived the petition to be supported by the Company, and may well have signed it because he feared that management would become aware of his decision to sign it or not to sign it. As noted by the Board in *Radio Shack*, [1978] OLRB Rep. Nov. 1043, at paragraph 24:

Having regard to the sensitive nature of the employer-employee relationship, the Board has consistently held that it must be governed by the overall environment in the work place in deciding whether or not the statement of desire represents a voluntary expression of those who signed it. If the evidence establishes that the hand of management has been actively involved in its origination, preparation or circulation, the Board will dismiss the statement. The Board will also, however, dismiss the statement if the evidence establishes that an employee might reasonably suspect the involvement of management and hence be concerned as to whether or not management might become aware of his decision to sign it or not to sign it. (See *Morgan Adhesives of Canada Ltd.*, [1975] OLRB Rep. Nov. 813 and the cases cited therein.)

13. For the foregoing reasons, the Board is not satisfied on the balance of probabilities that

the petition is a voluntary statement of desire in respect of the wishes of any of the labourers who were in the employ of the respondent at the relevant time. In view of that conclusion, it is unnecessary to deal with Union counsel's alternative submission that the petitioners did not tell the Board the truth about the origination of the petition. It is also unnecessary to consider the effect, if any, of Sandy Thornton's involvement in the matter.

14. As indicated earlier in this decision, there is a dispute among the parties regarding whether or not Mr. Lima exercises managerial functions within the meaning of section 1(3)(b) of the Act. In considering the validity of the petition, we have found it unnecessary to determine that issue, as the fact that employees reasonably perceived Mr. Lima to be their "boss", and to have the power to hire and fire them, was sufficient for the purposes of that aspect of the case. Counsel for the respondent suggested that a Board Officer should be appointed to inquire into and report to the Board concerning Mr. Lima's duties and responsibilities, so that the matter of his status could be resolved. However, neither the bargaining unit description nor the applicant's entitlement to certification is affected by that issue. As noted by the Board in *Robin Hood Multifoods Inc.*, [1985] OLRB Rep. July 1159, "where, as here, the description of the appropriate bargaining unit has been settled and the Board can say with certainty that more than 55 per cent of the employees in that unit on the application date were members of the applicant at the relevant time, the Board [has] the jurisdiction to grant the applicant a final certificate, notwithstanding the existence of questions which could be dealt with under subsection 106(2)." We are satisfied that we should exercise that jurisdiction in the instant case. In the event that the applicant and the respondent are unable to resolve the matter of Mr. Lima's status, they may refer that question to the Board, at an appropriate time, for decision under section 106(2).

15. As indicated above, the Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on August 14, 1987, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the Act.

16. Pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named above in respect of all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

17. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant in respect of all construction labourers in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen, and persons above the rank of non-working foreman.

1588-87-R International Woodworkers of America, Applicant v. **Wire Rope Industries Ltd.**, Respondent v. Lumber and Sawmill Workers' Union, Local 2693, of the United Brotherhood of Carpenters and Joiners of America, Intervener

Certification - Pre-Hearing Vote - Voting constituency where only one employee in one of the two units the incumbent union represents - Single voting constituency combining two units appropriate - Each ballot to be segregated - Preliminary objection to timeliness of application to be dealt with after vote - Challenge to bargaining rights of applicant not entertained because no termination application before the Board

BEFORE: *Patricia Hughes*, Vice-Chair, and Board Members *R. M. Sloan* and *D. A. Patterson*.

DECISION OF THE BOARD; October 7, 1987

1. This is an application for certification in which the applicant has requested a pre-hearing representation vote.
2. The name of the respondent is amended to read "Wire Rope Industries Ltd.". "Lumber and Sawmill Workers' Union, Local 2693, of the United Brotherhood of Carpenters and Joiners of America" ("Local 2693") is added to the style of cause as intervener. Local 2693 is the current bargaining agent for the employees who are the subject of this application. Local 2693 did not file an intervention but its representative was in attendance at the meeting convened by the Labour Relations Officer pursuant to the Board's decision dated September 11, 1987.
3. The intervener and the respondent are parties to a collective agreement with a termination date of July 31, 1987 but continuing "from year to year thereafter unless either party desires to change or terminate" it. This application was made on September 4, 1987. The respondent raises certain issues relating to this agreement which are set out below.
4. The parties have agreed that there should be two bargaining units described as follows:

all employees of the company at Thunder Bay, save and except non-working foremen, persons above the rank of non-working foremen and office and sales staff [B.U. #1];

and

all office employees of the company at Thunder Bay, save and except manager, persons above the rank of manager, outside salesmen and persons covered by bargaining unit no. 1 [B.U. #2].

These are the bargaining units as described by the collective agreement referred to in paragraph 3 above.

5. Where the parties have agreed to the bargaining unit description(s), the Board usually strikes a voting constituency to reflect that agreement. This is particularly so where there is an existing collective agreement and the agreed-to units are identical to the bargaining units described in the agreement. It is often so even where the Board has concerns about the way in which the bargaining unit is described. The Board normally strikes the voting constituency and then the parties are given the opportunity to address the issue of the bargaining unit description at a hearing held after the vote has been taken.

6. As indicated, the parties here have agreed on the bargaining unit descriptions which appear in the collective agreement. However, there is only one person in bargaining unit no. 2. (To be clear, this is not a situation in which there are two employees in the unit, only one of whom has signed a membership card, but rather a situation in which the number of employees in the unit is only one.) Subsection 6(1) of the *Labour Relations Act* (“the Act”) states that the Board is to determine the appropriate bargaining unit “but in every case the unit shall consist of more than one employee”. The Board will not certify a union to represent a bargaining unit composed of one individual. Depending on the circumstances, that individual would either be “swept into” another unit or would be left without union representation. In this instance, the applicant is seeking certification by virtue of displacing the incumbent union, Local 2693. Local 2693 has represented the single employee in bargaining unit no. 2. There is no evidence before us or submissions made that the unit was ever composed of more than one person. The Board is now being asked by the applicant to certify it as the bargaining agent of the employees currently represented by Local 2693. The Board cannot continue the status quo by certifying the applicant, if successful, as the bargaining agent of the single employee in the proposed bargaining unit no. 2.

7. Accordingly, there is no point in striking a voting constituency reflecting the description of the agreed-upon bargaining unit no. 2 since the Board would not likely certify bargaining unit no. 2 on the information now before us. However, it is not for us but for the panel hearing submissions of the parties after the vote is taken to decide the appropriate bargaining unit(s) and how that single employee is to be treated. It is therefore necessary to strike a voting constituency which encompasses the broadest unit, reflecting the possible options at issue. It must be possible to reconstruct the eventual bargaining unit(s) from the voting constituency: *Scarborough General Hospital*, [1984] OLRB Rep. Dec. 1765. In this instance the possible options include the two bargaining units agreed to by the parties (as indicated, while this is not a likely result, this panel does not make a decision on this issue and it remains to be considered by the post-vote panel) or a single unit which would not except the sales staff (the job description of the single employee who appears to be in bargaining unit no. 2 is “inside sales representative”). (We note that the applicant originally applied for a single unit.)

8. Therefore, the Board determines that the voting constituency will be

all employees of the respondent at Thunder Bay, save and except non-working foremen, persons above the rank of non-working foremen, and outside salesmen.

CLARITY NOTE:

The Board notes that for purposes determining which employees are in the voting constituency, managers and persons above the rank of manager are excluded.

This description encompasses the employees who are covered by the two bargaining units described in the collective agreement. In order to ensure that the various options are left open by this voting constituency, each ballot will be segregated. The parties may address the issue of the appropriate bargaining unit(s) at a hearing after the vote has been taken (or may make written submissions relating thereto).

9. It appears to the Board, on an examination of the records of both the applicant and the respondent, that not less than thirty-five per cent of the employees of the respondent in the voting constituency described above were members of the applicant at the time the application was made. We note in this regard that the applicant has sufficient appearance of support regardless of whether

we determine the voting constituency as above or whether we strike two voting constituencies mirroring the two bargaining units agreed to by the parties and described in the collective agreement.

10. In its reply, the respondent raises two objections to the applicant's application; although it does not request that a vote not be taken, one of these objections has the potential of postponing the vote until the matter has been resolved. In an "Annex" to its Reply, the respondent states:

Lumber and Sawmill Workers Union, Local 2693, of the United Brotherhood of Carpenters and Joiners of America (the Union) served Wire Rope Industries (the respondent) with notice to bargain on April 23rd, 1987 in accordance with the provisions of the collective agreement and Sections 53(1) and (2) of the Labour Relations Act (the Act). Since the Union did not commence to bargain within the sixty days following the giving of the notice the respondent's position is that the Labour Relations Board (the Board) should declare that the Union no longer represents the employees in the bargaining unit in accordance with Section 59(2) of the Act. Therefore, should the International Woodworkers of America (the applicant) otherwise meet the requirements of the Act, the ballot should be worded to provide employees simply with the choice of whether they wish the applicant to represent them or not.

In the alternative, should the Board not make such a declaration then the failure to bargain should be deemed to have the effect of continuing the collective agreement in effect until July 31, 1988, in which case the application by the applicant is not timely as required by Section 5(4) of the Act.

11. With respect to the first of these objections, that Local 2693 no longer represents the employees in the unit, although the respondent did not request that the vote be postponed, the Board would normally not hold the vote until the names to be placed on the ballot were established. It would not be desirable to complicate the matter by requiring employees to fill out more than one ballot in order to accommodate various combinations of eligible parties. There has been no application under subsection 59(2) of the Act filed with the Board. In any case, Local 2693 would not cease to represent the employees until a declaration to that effect had been made by the Board: no such declaration was made by the date of application and therefore at the time of application Local 2693 was still the bargaining agent of the affected employees. Accordingly, the name of Local 2693 properly belongs on the ballot. Under the circumstances, it is not necessary to hold a hearing to determine that matter prior to directing the vote. It is not sufficient to raise an issue which may have the effect of postponing the vote; the objection must also make out a *prima facie* case. In this instance, since there was no application under subsection 59(2) of the Act by the date of the application, the issue of whether Local 2693 continues to represent these employees is not before the Board.

12. The second objection made by the respondent is that the application is not timely. This is a matter that can be determined after the taking of a vote. At the Officer's meeting, the parties indicated that they are prepared to make written submissions to the Board on the respondent's objections. They may still choose to do so. If, however, they prefer to make oral argument on the matter of the bargaining unit, they may make oral submissions on timeliness at the same time.

13. Therefore, the Board directs the taking of a pre-hearing representation vote in this application.

14. All employees in the voting constituency on September 21, 1987 who have not voluntarily terminated their employment or who have not been discharged for cause between September 21, 1987 and the date the vote is taken will be eligible to vote.

15. The ballot of each employee who votes is to be segregated; further, the ballot box is to be sealed and the votes not counted until further order of the Board.

16. Voters will be asked whether they wish to be represented by the applicant or by the intervener in their employment relations with the respondent.

17. This matter is referred to the Registrar to make vote arrangements and to schedule a hearing at which the parties may address all outstanding issues, including the timeliness of the application and whether there should be one or two bargaining units and the description of such unit(s) and, in the event the Board determines that two units are appropriate and that there is only one employee in one of those units, the appropriate treatment of that employee.

CASE LISTINGS SEPTEMBER 1987

	PAGE
1. Applications for Certification	235
2. Applications for First Contract Arbitration	245
3. Applications for Declaration of Related Employer.....	245
4. Sale of a Business	246
5. Union Successor Rights	246
6. Applications for Declaration Terminating Bargaining Rights.....	246
7. Applications for Declaration of Unlawful Strike	247
8. Applications for Declaration of Unlawful Strike (Construction Industry)	247
9. Complaints of Unfair Labour Practice	248
10. Applications for Religious Exemption.....	250
11. Applications for Consent to Early Termination of Collective Agreement	250
12. Applications for Determination of Employee Status.....	250
13. Complaints Under the Occupational Health & Safety Act	251
14. Construction Industry Grievances	251
15. Applications for Reconsideration of Board's Decision	254
16. Right of Access	254

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING SEPTEMBER 1987

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

2421-86-R: Brewery, Malt & Soft Drink Workers, Local 304 (Applicant) v. Senator Hotels Limited (Respondent)

Unit #1: "all employees of Senator Hotels Limited at Timmins, Ontario, save and except department heads and persons above the rank of department head, office and sales staff, front desk staff, switchboard operators, security personnel, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (40 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of Senator Hotels Limited at Timmins, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except department heads, persons above the rank of department head, office and sales staff, front desk staff, switchboard operators, and security personnel" (29 employees in unit) (*Having regard to the agreement of the parties*)

0103-87-R: Canadian Union of Public Employees (Applicant) v. Windsor Association for the Mentally Retarded (Respondent)

Unit: "all office and clerical employees of the respondent in Windsor, Ontario, save and except supervisors, persons above the rank of supervisor, Private Secretary to the Executive Director, Administrative Assistant, Accountant, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons employed on temporary projects financed in whole or in part by government funding" (7 employees in unit)

0493-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. 438090 Ontario Limited, c.o.b. as Centennial Railings (Respondent) v. Group of Employees (Objectors)

Unit: "all carpenters, carpenters' apprentices, and labourers in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar and the Towns of Ajax and Pickering in the Regional Municipality of Durham, in all sectors of the construction industry excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (18 employees in unit)

0562-87-R: Canadian Glassworkers Union (Applicant) v. Consumers Packaging Inc. (Respondent) v. Aluminium, Brick & Glassworkers International Union (Intervenor)

Unit: "all employees of the respondent at its Toronto plant save and except assistant foremen, persons above the rank of assistant foreman, stationary engineers, security guards, office, clerical and sales staff" (804 employees in unit) (*Having regard to the agreement of the parties*)

0596-87-R: United Steelworkers of America (Applicant) v. Parnell Foods Limited (Respondent)

Unit #1: "all employees of the respondent at the Algoma Steel Corporation Limited in Sault Ste. Marie, save and except manager, persons above the rank of manager, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (7 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent at the Algoma Steel Corporation Limited in Sault Ste. Marie regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except manager, persons above the rank of manager, and office staff" (4 employees in unit) (*Having regard to the agreement of the parties*)

0687-87-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Kent Concrete Forming Ltd. (Respondent) v. Group of Employees (Objectors)

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (19 employees in unit)

Unit #2: "all construction labourers in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (19 employees in unit)

0796-87-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Board of Education for the City of London (Respondent)

Unit: "all occasional teachers employed by the respondent in its secondary panel in the City of London" (171 employees in unit) (*Having regard to the agreement of the parties*)

1046-87-R: United Food & Commercial Workers International Union, Local 175, affiliated with the Canadian Labour Congress (Applicant) v. 539747 Ontario Inc. (Respondent)

Unit: "all employees of the respondent at Thunder Bay, save and except manager and those above the rank of manager" (16 employees in unit) (*Having regard to the agreement of the parties*)

1126-87-R: International Brotherhood of Painters & Allied Trades, Local 1824 (Applicant) v. Mike's Painting & Decorating, division of Mike McMahon's Painting & Decorating Ltd. (Respondent) v. Group of Employees (Objectors)

Unit #1: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

Unit #2: "all painters and painters' apprentices in the employ of the respondent in all other sectors of the construction industry, except the industrial, commercial and institutional sector in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township, and in the County of Wellington, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

1138-87-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Blue Line Taxi Co. Ltd. (Respondent)

Unit: "all employees of the respondent licensed as taxi drivers by the City of Gloucester, save and except dispatch staff, supervisors, persons above the rank of supervisor, multi-plate owners, multi-plate lessees and employees in bargaining units for which any trade union held bargaining rights as of July 23, 1987" (19 employees in unit) (*Having regard to the agreement of the parties*)

1208-87-R: Christian Labour Association of Canada (Applicant) v. I.O.O.F. Senior Citizen Homes Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Barrie, save and except supervisors, persons above the rank of supervisor, Director of Activities, registered and graduate nurses, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (63 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1209-87-R: Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local 91, affiliated with International

Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. R. L. Crain Inc. (Respondent)

Unit: “all employees of the respondent in the City of Ottawa, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (168 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1226-87-R: Service Employees Union, Local 183 (Applicant) v. Hamstead Properties Limited (Respondent)

Unit #1: “all employees of the City of Kingston save and except registered and graduate nurses, supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (18 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: “all employees of the respondent in the City of Kingston employed for not more than 24 hours per week, and students employed during the school vacation period save and except registered and graduate nurses, supervisors and persons above the rank of supervisor” (17 employees in unit) (*Having regard to the agreement of the parties*)

1239-87-R: United Steelworkers of America (Applicant) v. Steetley Talc Inc. (Respondent)

Unit: “all employees of the respondent in the City of Timmins, save and except foremen, persons above the rank of foreman, office and sales staff, and employees in bargaining units for which any trade union held bargaining rights as of August 6, 1987” (9 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1242-87-R: Teamsters Local Union 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Crane Canada Inc. (Respondent)

Unit: “all employees of the respondent in Oshawa, save and except supervisors, persons above the rank of supervisor, and office and sales staff” (2 employees in unit) (*Having regard to the agreement of the parties*)

1261-87-R: United Steelworkers of America (Applicant) v. St. Mary’s Cement Corp. (Respondent)

Unit: “all employees of the respondent in the City of Gloucester, save and except forepersons, those above the rank of foreperson, and office and clerical staff” (2 employees in unit) (*Having regard to the agreement of the parties*)

1273-87-R: Service Employees’ International Union, Local 204, S.E.I.U., AFL:CIO:CLC (Applicant) v. Visiting Homemakers Association (Respondent)

Unit #1: “all employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (250 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: (see *Applications for Certification Dismissed Without Vote*)

1276-87-R: International Union of Operating Engineers, Local 793 (Applicant) v. Roadtec Incorporated (Respondent)

Unit: “all employees of the respondent in the Regional Municipality of Peel save and except foremen, persons above the rank of foreman, office and sales staff” (7 employees in unit)

1302-87-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Burlington Engineering Ltd. (Respondent)

Unit: “all employees of the respondent in Burlington, save and except supervisors, persons above the rank of supervisor, office and sales staff” (19 employees in unit) (*Having regard to the agreement of the parties*)

1304-87-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. VS Services Ltd. (Respondent)

Unit: "all employees of the respondent at American Motors Corporation in the City of Brampton, save and except supervisors, those above the rank of supervisor, office and sales staff, chef, and students employed during the school vacation period" (17 employees in unit) (*Having regard to the agreement of the parties*)

1331-87-R: International Union of Operating Engineers, Local 793 (Applicant) v. 369150 Ontario Limited, c.o.b. as B-4 Equipment Sales (Respondent)

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (12 employees in unit)

Unit #2: "all employees of the respondent in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the county of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (12 employees in unit)

1360-87-R: United Brotherhood of Carpenters & Joiners of America - Drywall, Acoustic, Lathing & Insulation, Local 675 (Applicant) v. Mag Drywall Ltd. (Respondent)

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (24 employees in unit)

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors of the construction industry, except the industrial, commercial and institutional sector in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Manvers in the County of Victoria, save and except non-working foremen and persons above the rank of non-working foreman" (24 employees in unit)

1376-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Feliciano Carpentry Interior Finishing (Respondent)

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors of the construction industry except the industrial, commercial and institutional sector in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

1377-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Jack Lowe (Respondent)

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors of the construction industry except the industrial, commercial and institutional sector in the Municipality of Metro-

politan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

1380-87-R: Teamsters Local Union 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. 688966 Ontario Inc., c.o.b. as Armoured Transport of Canada (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in the Town of Vaughan, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (39 employees in unit) (*Having regard to the agreement of the parties*)

1389-87-R: Ironworkers District Council of Ontario (Applicant) v. Equicon Engineering Limited (Respondent)

Unit #1: “all ironworkers and ironworkers’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

Unit #2: “all ironworkers and ironworkers’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit)

1393-87-R: International Union of Operating Engineers, Local 793 (Applicant) v. Gaston H. Poulin, Contractor Limited (Respondent)

Unit: “all employees engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in repairing and maintaining of same, and all truck drivers, labourers and employees engaged as surveyors in the employ of the respondent in all sectors of the construction industry other than the industrial, commercial and institutional sector in the District of Rainy River, save and except non-working foremen and persons above the rank of non-working foreman” (29 employees in unit)

1449-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Landucon Developments Limited (Respondent)

Unit #1: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

Unit #2: “all carpenters and carpenters’ apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

1464-87-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. K-S-H Canada Inc. (Respondent)

Unit: “all employees of the respondent in the City of Mississauga, save and except foremen, persons above the rank of foreman, office, and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (40 employees in unit) (*Having regard to the agreement of the parties*)

1547-87-R: International Union of Operating Engineers, Local 793 (Applicant) v. Leo Alarie & Sons Ltd. (Respondent) v. Labourers' International Union of North America, Ontario Provincial District Council (Intervener)

Unit: "all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same and all construction labourers in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

1574-87-R: Ironworkers District of Ontario (Applicant) v. A. Reisman Construction Ltd. (Respondent)

Unit #1: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

Unit #2: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

1576-87-R: International Brotherhood of Carpenters & Allied Trades, Local 557 (Applicant) v. R.S.B. Painting & Decorating (Respondent)

Unit #1: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

Unit #2: "all painters and painters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

1014-87-R: Canadian Union of Public Employees (Applicant) v. Windsor Association for the Mentally Retarded (Respondent)

Unit: "all employees of the respondent at Windsor regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except teaching supervisors, group home supervisors, janitorial supervisor, programme co-ordinators, managers and superintendents, those above the rank of teaching supervisor, group home supervisor, janitorial supervisor, programme co-ordinator, manager and superintendent, office and clerical staff, all persons employed in a vocational training programme, and persons employed on temporary projects financed in whole or in part by Municipal, Provincial and Federal Government funding" (150 employees in unit)

Number of names of persons on list as originally prepared by employer	150
Number of persons who cast ballots	85
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	54
Number of ballots marked against applicant	22
Ballots segregated and not counted	8

1060-87-R: Canadian Paper Workers Union (Applicant) v. Abitibi-Price Inc. (Respondent) v. Lumber &

Sawmill Workers' Union, Local 2693, of the United Brotherhood of Carpenters & Joiners of America (Intervener #1) v. International Woodworkers of America (Intervener #2)

Unit: "all employees of the respondent in its Lakehead Woodlands Division who are engaged in Woods Operations on the limits and on the work sites of the respondent" (259 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list		259
Number of persons who cast ballots	219	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		56
Number of ballots marked in favour of intervener #1		9
Number of ballots marked in favour of intervener #2		153

1152-87-R: International Woodworkers of America (Applicant) v. Normick Perron Inc. (Respondent)

Unit: "all employees of the respondent at its Plywood Plant and Third Department in the Cochrane Division at Cochrane, save and except foremen, persons above the rank of foreman, office staff and scalers" (127 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer		127
Number of persons who cast ballots	73	
Number of ballots marked in favour of applicant		64
Number of ballots marked in favour of The Lumber and Sawmill Workers' Union Local 2995 of the United Brotherhood of Carpenters and Joiners of America		9

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

2497-86-R: United Steelworkers of America (Applicant) v. Haley Industries Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all office and clerical employees of the respondent in the County of Renfrew, save and except supervisors, persons above the rank of supervisor, and engineering and technical employees" (24 employees in unit)

Number of names of persons on list as originally prepared by employer		24
Number of persons who cast ballots	23	
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	23	
Number of segregated ballots cast by persons whose names appear on voters' list		0
Number of ballots marked in favour of applicant		13
Number of ballots marked against applicant		10

3442-86-R: Ontario Public Service Employees Union (Applicant) v. Grand River Conservation Authority (Respondent)

Unit: "all employees of the respondent in the Cities of Cambridge, Brantford and Waterloo, the Towns of Dunnville and Haldimand and the Townships of West Garafraxa, Peel, Pilkington, Guelph, East Luther, South Dumfries, North Dumfries, Brantford and Burford regularly employed for not more than 24 hours per week, save and except managers and persons above the rank of manager, professional and graduate engineers employed in an engineering capacity, office and clerical employees and students employed during the school vacation period" (15 employees in unit)

Number of names of persons on revised voters' list		15
Number of persons who cast ballots	7	
Number of ballots marked in favour of applicant		5
Number of ballots marked against applicant		2

0991-87-R: United Steelworkers of America (Applicant) v. Alpa Lumber Inc. (Respondent)

Unit: "all employees of the respondent in Burlington, save and except forepersons, those above the rank of

foreperson, office, clerical and sales staff, retail sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (129 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list		129
Number of persons who cast ballots	119	
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	112	
Number of segregated ballots cast by persons whose names appear on voters' list	7	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		80
Number of ballots marked against applicant		31
Ballots segregated and not counted		7

1210-87-R: Teamsters, Chauffeurs, Warehousemen & Helpers, Local 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Retco Industries Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Windsor, save and except supervisors, persons above the rank of supervisor, office and sales staff" (39 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer		39
Number of persons who cast ballots	39	
Number of ballots marked in favour of applicant		23
Number of ballots marked against applicant		16

Applications for Certification Dismissed Without Vote

2780-86-R: Ironworkers District Council of Ontario (Applicant) v. 584994 Ontario Inc., c.o.b. as New Jersey Steel Fabricators, and 671088 Ontario Limited, c.o.b. as New Jersey Steel (Respondents) (8 employees in unit)

0088-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Nimel Construction Limited (Respondent) v. Labourers' International Union of North America, Local 183 (Intervener)

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario" (7 employees in unit)

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills, that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

0478-87-R: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. Dunmark Electric (Ancaster) Limited (Respondent) v. Construction Workers, Local 6, affiliated with the Christian Labour Association of Canada (Intervener) v. Group of Employees (Objectors) (15 employees in unit)

0632-87-R: Construction Workers, Local 6, affiliated with the Christian Labour Association of Canada (Applicant) v. Dunmark Electric (Ancaster) Limited (Respondent) v. Group of Employees (Objectors) (3 employees in unit)

0936-87-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Ferlandi Builders Inc. (Respondent) (2 employees in unit)

1038-87-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Advance Automotive Industries Inc. (Respondent) (41 employees in unit)

1194-87-R: The Canadian Union of Public Employees (Applicant) v. The University of Western Ontario (Respondent) (1,332 employees in unit)

1249-87-R: United Brotherhood of Carpenters & Joiners of America (Applicant) v. Elizabeth Hughes & Associates (Respondent) (6 employees in unit)

1273-87-R: Service Employees International Union, Local 204, S.E.I.U., AFL:CIO:CLC (Applicant) v. Visiting Homemakers Association (Respondent)

Unit #1: (see *Bargaining Agents Certified Without Vote*)

Unit #2: "all employees of the respondent in Metropolitan Toronto regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, and office and clerical staff" (*number of employees in unit not available*) (*Having regard to the agreement of the parties*)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

0923-87-R: United Steelworkers of America (Applicant) v. CCL Industries Inc. (Respondent)

Unit: "all employees of the respondent at its K-G Packaging Division in the Town of Vaughan, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period" (148 employees in unit)

Number of names of persons on revised voters' list		148
Number of persons who cast ballots	133	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		31
Number of ballots marked against applicant		96
Ballots segregated and not counted		5

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

3009-85-R: The Operative Plasterers' & Cement Masons' International Association of the United States & Canada, Local 172 (Applicant) v. Multi-Amp Canada Limited (Respondent) v. An Employee (Objector)

Unit: "the employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, those above the rank of foreman, office and sales staff" (27 employees in unit)

Number of names of persons on list as originally prepared by employer		27
Number of persons who cast ballots	27	
Number of ballots marked in favour of applicant		9
Number of ballots marked against applicant		18

3527-86-R: International Union of Operating Engineers, Local 793 (Applicant) v. Gabriel Ltd., Excavating & Contracting (Respondent)

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

Number of names of persons on voters' list		6
Number of persons who cast ballots	7	
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	4	
Number of segregated ballots cast by persons whose names appear on voters' list		1
Number of segregated ballots cast by persons whose names do not appear on voters' list		2
Number of ballots marked in favour of applicant		0
Number of ballots marked against applicant		

0750-87-R: International Union of United Automobile, Aerospace & Agricultural Implement Workers of America, U.A.W. (Applicant) v. Dover Auto Wreckers Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Township of Dover, save and except supervisors, persons above the rank of supervisor, and office staff" (8 employees in unit)

Number of names of persons on revised voters' list		8
Number of persons who cast ballots	8	
Number of ballots marked in favour of applicant		4
Number of ballots marked against applicant		4

0841-87-R: United Brotherhood of Carpenters & Joiners of America, General Workers Union, Local 1030 (Applicant) v. 137215 Canada Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Glengarry County, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (35 employees in unit)

Number of persons on voters' list at start of vote		35
Number of persons who cast ballots	28	
Number of ballots marked in favour of applicant		11
Number of ballots marked against applicant		17

0903-87-R: United Steelworkers of America (Applicant) v. Rio Algom Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office, clerical, technical and sales staff and students employed during the school vacation period or on a co-operative training basis with a recognized college or university" (125 employees in unit)

Number of names of persons on list as originally prepared by employer		125
Number of persons who cast ballots	119	
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	113	
Number of segregated ballots cast by persons whose names appear on voters' list	6	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		50
Number of ballots marked against applicant		62
Ballots segregated and not counted		6

0999-87-R: United Food & Commercial Workers International Union (Applicant) v. Glendale Golf & Country Club Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Regional Municipality of Hamilton-Wentworth, save and except supervisors, persons above the rank of supervisor, office and clerical staff, the golf professional, and students" (31 employees in unit)

Number of names of persons on list as originally prepared by employer		31
Number of persons who cast ballots	23	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		4
Number of ballots marked against applicant		18

Applications for Certification Withdrawn

0173-87-R: International Ladies' Garment Workers' Union (Applicant) v. The Sigal Shirt Company Limited, and Activo Sportswear (Canada) Ltd. (Respondents)

0257-87-R: Labourers' International Union of North America, Local 1036 (Applicant) v. Lento Masonry Sault Ltd. (Respondent)

0636-87-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Seal-On Paving Ltd. (Respondent) v. Group of Employees (Objectors)

0704-87-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Peterborough County Board of Education (Respondent)

0749-87-R: Amalgamated Transit Union, Local 966 (Applicant) v. Handi-Transit (Handicap Action Group Inc.) (Respondent)

0916-87-R: Faculty Association of Windsor Law Teachers (Applicant) v. Board of Governors, University of Windsor (Respondent) v. Faculty Association of the University of Windsor (Intervener #1) v. Canadian Union of Public Employees (Intervener #2)

0966-87-R: The International Brotherhood of Electrical Workers, Local 1730 (Applicant) v. The Corporation of the Town of Dryden (Respondent)

1240-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Starchip (Respondent)

1320-87-R: United Food & Commercial Workers' International Union, Local 175, AFL:CIO:CLC (Applicant) v. Hockley Valley Resort Ltd. (Respondent)

1328-87-R: Labourers' International Union of North America, Local 506 (Applicant) v. Nygard International (Respondent)

1425-87-R: Textile Processors, Service Trades, Health Care, Professional & Technical Employees International Union, Local 351 (Applicant) v. The Westin Hotel (Respondent)

1463-87-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Larsen Transfer of Sudbury Limited (Respondent)

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

3546-86-FC: Labourers' International Union of North America, Local 1059 (Applicant) v. Co-Fo Concrete Forming Construction Limited (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

3239-86-R: Greater Northern Ontario Trucking Association (Applicant) v. Ethier Sand & Gravel Limited, and Ethier Contractors (Sudbury) Limited (Respondents) v. Labourers' International Union of North America, Local 493 (Intervener) (*Withdrawn*)

0586-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Big H Limited, 650737 Ontario Limited, and Avenue Lawrence Investments (Respondents) (*Granted*)

0842-87-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Interborough Electric Incorporated, Interborough Electric (Ontario) Inc., 645839 Ontario Limited, c.o.b. as Marnik Electric (Respondents) (*Granted*)

0880-87-R: Labourers' International Union of North America, Local 506 (Applicant) v. Big H Limited, 650737 Ontario Limited, and Avenue Lawrence Investments (Respondents) (*Granted*)

1133-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Lincoln Carpentry Ltd., and Pagran Enterprises Inc. (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

2962-86-R: United Brotherhood of Carpenters & Joiners of America, Local 1030 (Applicant) v. Sceptre Forest Products Limited (Respondent) (*Dismissed*)

0222-87-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Elgin Construction Company Limited, and 692757 Ontario Limited (Respondents) (*Withdrawn*)

0926-87-R: United Steelworkers of America (Applicant) v. Hymac Machine Shop Limited and/or 712120 Ontario Limited (Respondent) (*Withdrawn*)

1132-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Lincoln Carpentry Ltd., and Pagran Enterprises Inc. (Respondents) (*Withdrawn*)

1338-87-R: Hotel Employees & Restaurant Employees Union, Local 604, AFL:CIO:CLC (Applicant) v. 564002 Ontario Limited (Respondent) (*Granted*)

1658-87-R: The Form Work Council of Ontario (Applicant) v. Starcip Forming Ltd., and Double D Forming Ltd. (Respondent) (*Withdrawn*)

UNION SUCCESSOR RIGHTS

0205-87-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. I.B.L. Industries Limited (Respondent) v. Group of Employees (Objectors) (*Granted*)

0954-87-R: United Steelworkers of America (Applicant) v. Rubberset Company (Canada), division of Sherwin Williams (Canada) Inc. (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0723-87-R: Jocelyn Myre, and Daniel Joly (Applicants) v. Ouvriers Unis des Textile d'Amerique, Local 495 (Respondent) v. Fiberworld, division of Dominion Textile Inc. (Intervener)

Unit: "all employees of Fiberworld division of Dominion Textile Inc., at its plant in Hawkesbury, save and except foremen, persons above the rank of foreman, office and sales staff, nurses, persons regularly employed for not more than 11 hours per week and all other employees automatically excluded by the *Labour Relations Act*" (122 employees in unit) (*Granted*)

Number of names of persons on revised voter's list	122
Number of persons who cast ballots	112
Number of spoiled ballots	1

Number of ballots marked in favour of respondent	10
Number of ballots marked against respondent	101

0791-87-R: Harold Cochrane, rep. agent distributor of 676718 Ontario Ltd. (Applicant) v. John Fuller, business agent of R.W.D.S.U. (Respondent) (*Withdrawn*)

0828-87-R: Walter Lewis, on his own behalf and on behalf of the employees of GTE Sylvania Canada Limited (Applicant) v. United Electrical, Radio & Machine Workers of Canada, Local 539 (Respondent) v. GTE Sylvania Canada Limited (Intervener) v. Group of Employees (Objectors)

Unit: "all employees of the intervener in its HID Fixtures Division in the Municipality of Metropolitan Toronto, save and except supervisors, those above the rank of supervisor, office, sales laboratory and engineering staff and students employed during the school vacation period" (94 employees in unit) (*Dismissed*)

0981-87-R: Steven Johnston (Complainant) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), Local 222 (Respondent)

Unit: "all employees of the respondent in Oshawa, save and except foremen, persons above the rank of foreman, and office staff" (5 employees in unit) (*Granted*)

Number of names of persons on list as originally prepared by employer	5
Number of persons who cast ballots	4
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	4

1311-87-R: William Black (Applicant) v. Teamsters, Chauffeurs, Warehousemen & Helpers, Local 91 (Respondent) (1 employee in unit) (*Granted*)

1556-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Labourers' International Union of North America, Local 183, and Operating Engineers, Local 793 (Respondents) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

1456-87-U: The Board of Governors of Exhibition Place (Applicant) v. Canadian Union of Public Employees, Local 2840, Andrew Pawlowski, Ben Noordover, Andrew Lachowski, and Mark Darling (Respondents) (*Granted*)

1469-87-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), Local 1837, Unit 2 (Applicant) v. Northern Telecom Canada Limited, Kingston Works - Cable Division, CAW Local 1837, Unit 1 (Respondents) (*Dismissed*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

0859-87-U: International Association of Bridge, Structural & Ornamental Ironworkers, Local 759 (Applicant) v. Central Canadian Structures Limited (Respondent) (*Withdrawn*)

1445-87-U: Bay-Tower Homes Company Ltd, and Bay-Tower Management Limited (Applicants) v. Labourers' International Union of North America, Local 183, Michael Reilly, Lucio Oliveira, Vince Simone, et al. (Respondents) (*Withdrawn*)

1447-87-U: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Labourers' International Union of North America, Local 183, Bay Tower Homes Company, Bay Tower Management, Lidi Properties Ltd, M & M Amarcord Carpenters Ltd., Rocco Latitio, Michael Reilly, John Colacci, and Chester Ditoni (Respondents) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1573-86-U: Great Lakes Fishermen & Allied Workers' Union (Complainant) v. 538391 Ontario Limited, c.o.b. as Peralta Foods, Ilda C. (Respondent) (*Granted*)

1630-86-U: Kalevi A. Natti (Complainant) v. Teamsters Local 230, Ready Mix, Building Supply, Hydro & Construction Drivers, Warehousemen & Helpers (Respondents) v. Bot Construction Co. Ltd. (Intervener) (*Dismissed*)

3031-86-U: Canadian Union of Public Employees, Local 134 (Complainant) v. The Board of Education for the City of Toronto, and Don Creighton (Respondents) (*Withdrawn*)

3060-86-U: Toronto Typographical Union, Local 91 (Complainant) v. Burlington Air Express (Canada) Ltd. (Respondent) (*Granted*)

3109-86-U: Ronald Fox (Complainant) v. United Steelworkers of America, Local 4584 (Respondent) v. Lac Minerals Ltd., Macassa Division (Intervener) (*Dismissed*)

3472-86-U: Harold Walters (Complainant) v. Laundry & Linen Drivers & Industrial Workers' Union, Teamsters Local 847 (Respondent) v. Goldcrest Furniture Ltd. (Intervener) (*Withdrawn*)

0049-87-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. Journey's End Motels (Respondent) (*Withdrawn*)

0156-87-U: Hamilton Automatic Vending Company Limited (Complainant) v. Cement, Lime, Gypsum & Allied Workers, division of the International Brotherhood of Boilermakers, Ironship Builders, Blacksmiths, Forgers & Helpers, Local 576 (Respondents) (*Dismissed*)

0157-87-U: Lewis Adam Presner (Complainant) v. Ontario Public Service Employees Union (Respondent) (*Withdrawn*)

0346-87-U: Vincent McManus (Complainant) v. Professional & Clerical Workers of Canada (Respondent) v. Canadian Union of Operating Engineers & General Workers, Local 101 (Intervener) (*Granted*)

0431-87-U: Shirley Gilchrist (Complainant) v. Ottawa Citizen & Bargaining Unit O.T.U., Local 102, CWA Ottawa Typographical Union (Respondent) (*Withdrawn*)

0453-87-U: Labourers' International Union of North America, Local 493 (Applicant) v. Precast Tank & Vault Co. Limited (Respondent) v. Group of Employees (Objectors) (*Withdrawn*)

0658-87-U: Labourers' International Union of North America, Ontario Provincial District Council (Complainant) v. Seal-On Paving Ltd. (Respondent) (*Withdrawn*)

0698-87-U: Soug Surh (Complainant) v. Bakery, Confectionary & Tobacco Workers International Union, Local 181 (Respondent) (*Withdrawn*)

0776-87-U: Sylvia Hartmann (Complainant) v. American Federation of Grainmillers, Local 154 (Respondent) (*Withdrawn*)

0777-87-U: Sylvia Hartmann (Complainant) v. Kellogg-Salada Canada Inc. (Respondent) (*Withdrawn*)

0848-87-U: Amalgamated Clothing & Textile Workers Union, Local 303B (Complainant) v. John Forsyth Company Ltd. (Respondent) (*Withdrawn*)

0904-87-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. IBL Industries Limited (Respondent) (*Withdrawn*)

0944-87-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. 459142 Ontario Limited, c.o.b. as Spooner's Restaurant (Respondent) (*Withdrawn*)

0959-87-U: International Union of Operating Engineers, Local 793 (Complainant) v. Jim Bertram & Sons Construction Ltd. (Respondent) (*Withdrawn*)

0998-87-U: Irene Lamb (Complainant) v. CAW Local 80, and certain officers of the Union (Respondents) (*Withdrawn*)

1016-87-U: Corinne Stott (Complainant) v. Judy Monahan, Local Chairperson, Metro Division, C.B.R.T. & G.W., Local 307 (Respondent) v. Canadian Brotherhood of Railway, Transport & General Workers (Intervener) (*Withdrawn*)

1039-87-U: Dale H. Moore (Complainant) v. Patrick Clancy (Respondent) (*Withdrawn*)

1047-87-U: National Automobile, Aerospace & Agricultural Workers Union of Canada (CAW-Canada) (Complainant) v. IBL Industries Limited (Respondent) (*Withdrawn*)

1090-87-U: International Union of Operating Engineers, Local 793 (Complainant) v. Gabriel Excavating & Grading Limited (Respondent) (*Withdrawn*)

1108-87-U: Energy & Chemical Workers Union, Local 593 (Complainant) v. Petro-Canada Products, Trafalgar Refinery (Respondent) (*Withdrawn*)

1127-87-U: International Beverage Dispensers & Bartenders Union, Local 280, of the Hotel & Restaurant Employees & Bartenders International Union (Complainant) v. New Shamrock Hotel (1967), division of Cajega Enterprises Ltd., and Mr. James Theodorou (Respondents) (*Withdrawn*)

1161-87-U: Energy & Chemical Workers Union (Complainant) v. Serviplast Inc. (Respondent) (*Withdrawn*)

1168-87-U: International Brotherhood of Electrical Workers, Local 636 (Complainant) v. Dominion Electric Protection Company, c.o.b. as A.D.T. Security Systems (Respondent) (*Withdrawn*)

1186-87-U: United Food & Commercial Workers Union, Local 175, AFL:CIO:CLC (Complainant) v. Designer Classics Carpet Manufacturing Limited (Respondent) (*Withdrawn*)

1193-87-U: Teamsters Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Union Pump (Canada) Ltd. (Respondent) (*Withdrawn*)

1211-87-U: Teamsters, Chauffeurs, Warehousemen & Helpers, Local 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Retco Industries Ltd. (Respondent) (*Withdrawn*)

1227-87-U: Lee Woods (Complainant) v. London & District Service Workers' Union, Local 220 (Respondent) (*Withdrawn*)

1257-87-U: Laundry & Linen Drivers & Industrial Workers' Union, Teamsters Local 847 (Complainant) v. Easy Enterprises Inc. (Respondent) (*Withdrawn*)

1269-87-U: Joe Hurkens (Complainant) v. Koehring Waterous Committee, Local 397 (Respondent) (*Withdrawn*)

1290-87-U: Canadian Union of Restaurant & Related Employees, Hotel Employees Restaurant Employees, Local 88 (Complainant) v. Cara Operations Limited (Respondent) (*Withdrawn*)

1291-87-U: United Food & Commercial Workers Union, Local 175 (Complainant) v. Elm Hurst (Respondent) (*Withdrawn*)

1312-87-U: David McGibbon (Complainant) v. C & C Yachts (Respondent) (*Dismissed*)

1324-87-U: Abel da Silva, Jr. (Complainant) v. CUPE Local 43, and Municipality of Metropolitan Toronto Parks & Property Dept. (Respondents) (*Withdrawn*)

1397-87-U: Pasquale Parente (Complainant) v. Hotel & Restaurant Employees Union, Local 75, and Marriott Flight Kitchen (Respondents) (*Dismissed*)

1421-87-U: Jean M. Brown (Complainant) v. United Food & Commercial Workers Union, Locals 175 and 633 (Respondents) (*Withdrawn*)

1435-87-U: United Food & Commercial Workers Union, Local 175 (Complainant) v. Loblaws, division of Westfair Foods (Respondent) (*Withdrawn*)

1443-87-U: Teamsters Local 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Crane Canada Inc. (Respondent) (*Withdrawn*)

1445-87-U: United Brotherhood of Carpenters & Joiners of America, Local 27 (Complainant) v. Labourers' International Union of North America, Local 183 (Respondent) v. Toronto Housing Labour Bureau, and Bramalea Limited (Intervenors #1) v. Presidential Group Limited, and Presidential Group (Brookshire) Limited (Intervenors #2) (*Dismissed*)

1552-87-U; 1553-87-U; 1554-87-U: United Food & Commercial Workers Union, Local 175, of the United Food & Commercial Workers International Union (Complainant) v. Elite Carpet (formerly Designer Classic Carpet Manufacturing Limited) (Respondent) (*Withdrawn*)

1598-87-U: Teamsters Local 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Armoured Transport of Canada Ltd. (Respondent) (*Withdrawn*)

APPLICATIONS FOR RELIGIOUS EXEMPTION

1282-87-M: Elke Johanna Ensoll (Applicant) v. Graphic Communications International Union, Local 500M (Respondent Trade Union) v. Telfer Packaging Ltd. (Respondent Employer) (*Withdrawn*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0751-87-M: Work Wear Corporation of Canada Ltd. (Employer), and Textile Processors Service Trades, Health Care, Professional & Technical Employees International Union, Local 351 (Trade Union) (*Granted*)

1042-87-M: Work Wear Corporation of Canada Ltd. (Employer), and Textile Processors, Service Trades, Health Care, Professional & Technical Employees, International Union, Local 351 (Trade Union) (*Granted*)

1095-87-M: Dresser Canada Inc. (Employer), and United Steelworkers of America (Trade Union) (*Granted*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

2523-86-M: Canadian Union of Public Employees, Local 2210 (Applicant) v. The Regional Municipality of Haldimand-Norfolk (Respondent) (*Dismissed*)

2533-86-M: Canadian Union of Public Employees, Local 54 (Applicant) v. The Town of Ajax (Respondent) (*Dismissed*)

2717-86-M: The Corporation of the City of Woodstock (Applicant) v. Canadian Union of Public Employees, Local 1146 (Respondent) (*Granted*)

0500-87-M: Office & Professional Employees International Union, Local 81 (Complainant) v. UTDC Inc. (Respondent) (*Withdrawn*)

0503-87-M: Ethier Sand & Gravel Limited (Applicant) v. Greater Northern Ontario Trucking Association (Respondent) (*Withdrawn*)

1022-87-M: The Children's Aid Society of the Niagara Region (Applicant) v. Canadian Union of Public Employees, Local 2328 (Respondent) (*Dismissed*)

1337-87-M: Southern Ontario Newspaper Guild, Local 87, The Newspaper Guild (Applicant) v. Metroland Printing, Publishing & Distributing, division of Harlequin Enterprises Ltd. (Respondent) (*Dismissed*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH & SAFETY ACT

0170-87-OH: Aprile Wood (Complainant) v. Giles Tool Agency (Respondent) (*Withdrawn*)

0987-87-OH: Canadian Union of Public Employees, Local 6 (Complainant) v. The Regional Municipality of Sudbury (Respondent) (*Withdrawn*)

1438-87-OH: Sheet Metal Workers' International Association, Local 540 (Complainant) v. Selkirk Metalbestos (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

2405-86-M: Ontario Sheet Metal Workers Conference (Applicant) v. Ontario Hydro, Electrical Power Systems Construction Association (Respondents) (*Granted*)

2724-86-M: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 463 (Applicant) v. Sutherland & Shultz Limited (Respondent) (*Granted*)

3159-86-M: International Union of Operating Engineers, Local 793 (Applicant) v. B & L Gottardo Excavating Ltd. (Respondent) (*Withdrawn*)

0085-87-G: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Lodge 128 (Applicant) v. Great Lakes Fabricating (Respondent) (*Withdrawn*)

0717-87-G: Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen (Applicant) v. Wayne Penner Masonry Limited (Respondent) (*Granted*)

0801-87-G: Ontario Allied Construction Trades Council, and L.I.U.N.A., Local 1059 (Applicant) v. Ontario Hydro, and E.O.S.C.A. (Respondents) (*Dismissed*)

0862-87-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 759 (Applicant) v. Central Canadian Structures Limited (Respondent) (*Dismissed*)

0919-87-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, on its own behalf & on behalf of Local 463 (Applicant) v. Ontario Power Systems Construction Association, and Ontario Hydro (Respondents) (*Withdrawn*)

1122-87-G: Labourers' International Union of North America, Local 183 (Applicant) v. Sonterlan Construction Corporation (Respondent) (*Granted*)

1165-87-G: Labourers' International Union of North America, Local 183 (Applicant) v. Gamen Paving Ltd. (Respondent) (*Withdrawn*)

1268-87-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. K. D. Acoustics (Respondent) (*Granted*)

1286-87-G; 1287-87-G; 1288-87-G: International Brotherhood of Painters & Allied Trades, Local 1795 (Applicant) v. Campbell Glass Limited (Respondent) (*Granted*)

1310-87-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Northgate Electric Co. (Respondent) (*Withdrawn*)

1313-87-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Security Electric Corporation (Respondent) (*Granted*)

1314-87-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Aries Electric Services Ltd. (Respondent) (*Withdrawn*)

1321-87-G: Labourers' International Union of North America, Local 491 (Applicant) v. Acme Construction Ltd. (Respondent) (*Withdrawn*)

1332-87-G: International Union of Operating Engineers, Local 793 (Applicant) v. Danruss Contracting (1985) Windsor, Inc. (Respondent) (*Withdrawn*)

1341-87-G: Quality Control Council of Canada (Applicant) v. Hanson Materials Engineering (Respondent) (*Withdrawn*)

1346-87-G: Labourers' International Union of North America, Local 183 (Applicant) v. Joe Schmidt Carpentry Ltd. (Respondent) (*Withdrawn*)

1351-87-G: International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. Adams & Cain Electrical Contractors Ltd. (Respondent) (*Withdrawn*)

1366-87-G: Labourers' International Union of North America, Local 183 (Applicant) v. Draggon Contracting Ltd. (Respondent) (*Withdrawn*)

1367-87-G: Labourers' International Union of North America, Local 183 (Applicant) v. Pit-On Construction Co. Ltd. (Respondent) (*Withdrawn*)

1368-87-G: Labourers' International Union of North America, Local 183 (Applicant) v. Bayview Sod & Nursery Co. Ltd. (Respondent) (*Withdrawn*)

1369-87-G: Labourers' International Union of North America, Local 183 (Applicant) v. Lucy Construction Ltd. (Respondent) (*Withdrawn*)

1370-87-G: Labourers' International Union of North America, Local 183 (Applicant) v. G.L. Trenching Ltd. (Respondent) (*Withdrawn*)

1371-87-G: Labourers' International Union of North America, Local 183 (Applicant) v. Serrentino Equipment Inc. (Respondent) (*Withdrawn*)

1372-87-G: Labourers' International Union of North America, Local 183 (Applicant) v. Form Tech (567557 Ontario Ltd.) (Respondent) (*Withdrawn*)

1373-87-G: Labourers' International Union of North America, Local 183 (Applicant) v. Celmar Drain & Concrete (Respondent) (*Withdrawn*)

1374-87-G: Labourers' International Union of North America, Local 183 (Applicant) v. Tony Dimonte Drainage Ltd. (Respondent) (*Withdrawn*)

1375-87-G: Labourers' International Union of North America, Local 183 (Applicant) v. T. Reda Drain & Concrete Ltd. (Respondent) (*Withdrawn*)

1385-87-G: Labourers' International Union of North America, Local 247 (Applicant) v. Denis Brisbois Contractor Limited (Respondent) (*Granted*)

1392-87-G: Labourers' International Union of North America, Ontario Provincial District Council, and Labourers' International Union of North America, Local 183 (Applicants) v. Clarkson Construction, and Bot Construction Limited (Respondents) (*Withdrawn*)

1394-87-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Daily Star Construction Inc. (Respondent) (*Granted*)

1395-87-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. D.E.S. Carpentry (Respondent) (*Withdrawn*)

1396-87-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Junik Installations (Respondent) (*Withdrawn*)

1401-87-G: United Brotherhood of Carpenters & Joiners of America, Local 1669 (Applicant) v. Howard Insulation Co. (Respondent) (*Withdrawn*)

1413-87-G: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Thomas Fuller Construction Co. (1958) Limited (Respondent) (*Granted*)

1415-87-G: Labourers' International Union of North America, Local 183 (Applicant) v. Rockwell Concrete Forming Specialists Incorporated (Respondent) (*Withdrawn*)

1417-87-G: International Association of Bridge, Structural & Ornamental Iron Workers, Local 786 (Applicant) v. Pamo Construction Inc. (Respondent) (*Withdrawn*)

1418-87-G: Labourers' International Union of North America, Local 625 (Applicant) v. Traugot Construction (Respondent) (*Withdrawn*)

1423-87-G: Drywall, Acoustic, Lathing & Insulation Workers, Local 675, of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Nap Mon Construction Limited (Respondent) (*Withdrawn*)

1455-87-G: The International Union of Elevator Constructors, Local 96 (Applicant) v. Montgomery Kone Elevator Company Ltd. (Respondent) (*Withdrawn*)

1459-87-G: International Association of Bridge, Structural & Ornamental Iron Workers, Local 721 (Applicant) v. Sun Steel Company (Respondent) (*Withdrawn*)

1460-87-G: International Association of Bridge, Structural & Ornamental Iron Workers, Local 721 (Applicant) v. Ste-Alco Inc. (Respondent) (*Withdrawn*)

1467-87-G: International Union of Operating Engineers, Local 793 (Applicant) v. Cooper's Crane Rental (1987) Limited (Respondent) (*Granted*)

1539-87-G: Millwright & Machine Erectors, Local 1244, of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. ARC Boiler Repair Limited (Respondent) (*Withdrawn*)

1542-87-G: Drywall, Acoustic, Lathing & Insulation Workers, Local 675, of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Brunswick Drywall (Ontario) Ltd. (Respondent) (*Withdrawn*)

1544-87-G: Drywall, Acoustic, Lathing & Insulation Workers, Local 675, of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Tamerlane Drywall Limited (Respondent) (*Granted*)

1586-87-G: Labourers' International Union of North America, Local 183 (Applicant) v. Lrom Construction Limited (Respondent) (*Withdrawn*)

1624-87-G: Labourers' International Union of North America, Local 183 (Applicant) v. Raf-Tar Construction (Respondent) (*Withdrawn*)

1625-87-G: Labourers' International Union of North America, Local 183 (Applicant) v. Tri-Gar Construction Inc. (Respondent) (*Withdrawn*)

1627-87-G: Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen, Local 6 (Applicant) v. Bigelow-Liptak of Canada Ltd. (Respondent) (*Withdrawn*)

1656-87-G: Ontario Council of the International Brotherhood of Painters & Allied Trades, Local 1590 (Applicant) v. VTC Industrial Coatings Limited (Respondent) (*Withdrawn*)

1665-87-G: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. J.R. Noel Plastering Ltd. (Respondent) (*Withdrawn*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

0855-85-R: Ontario Public Service Employees Union (Applicant) v. Ottawa Day Nursery Inc., c.o.b. as Andrew Fleck Child Centre (Respondent) (*Dismissed*)

0211-87-R: Labourers' International Union of North America, Local 506 (Applicant) v. Menkes Developments Inc. (Respondent) v. Labourers' International Union of North America, Local 183 (Intervener) (*Dismissed*)

0375-87-R: Canadian Transport Workers Union (Applicant) v. Listowel Transport Lines Limited, J.E. Transport Limited, J.E. Transport Inc., and London Cartage & Delivery Limited (Respondents) (*Dismissed*)

0799-87-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Muller's Meats Ltd. (Respondent) v. Group of Employees (Objectors) (*Dismissed*)

0841-87-R: United Brotherhood of Carpenters & Joiners of America, General Workers' Union, Local 1030 (Applicant) v. 137215 Canada Inc. (Respondent) v. Group of Employees (Objectors) (*Dismissed*)

0849-87-JD: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Complainant) v. Catalytic Maintenance Inc., Petro-Canada Products, division of Petro-Canada Inc., and Energy & Chemical Workers' Union, Local 353 (Respondents) (*Dismissed*)

1149-87-U: Ray Joseph Buttineau Sr. (Complainant) v. Jack Porter (Respondent) (*Dismissed*)

1182-87-R: Labourers' International Union of North America, Local 183 (Applicant) v. Paddock Developments Ltd. (Respondent) (*Dismissed*)

RIGHT OF ACCESS

3242-86-M: Canadian Paperworkers Union (Applicant) v. Great Lakes Forest Products Limited (Respondent) v. Lumber & Sawmill Workers' Union (Intervener) (*Granted*)

3408-86-M: I.W.A. Canadian Regional Council No. 1 (Applicant) v. Great Lakes Forest Products Ltd. (Lakehead Woodlands Division) (Respondent) v. Canadian Paperworkers' Union (Intervener) (*Granted*)

*Ontario Labour Relations Board,
400 University Avenue,
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ONTARIO LABOUR RELATIONS BOARD REPORTS

November 1987



Ontario

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ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1987] OLRB REP. NOVEMBER

EDITOR: COLLEEN EDWARDS

Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.

Typeset, Printed and Bound by Union Labour in Ontario

CASES REPORTED

1. Algoma Steel Corporation, Limited, The; Re Algoma Steel Front-Line Foremen Association; Re U.S.W.A. and U.S.W.A., Locals 2251, 4509, 5595, 2251, 2288	1341
2. Belmont Plastering Co., Ben Plastering Limited, c.o.b. as; Re Drywall, Acoustic, Lathing and Insulation, Local 675, C.J.A.....	1347
3. Catalytic Maintenance Inc., Petro-Canada Products, A Division of Petro-Canada Inc., and E.C.W.U., Local 593; Re U.A., Local 46	1353
4. Copper Cliff Mechanical Contractors Ltd.; Re Millwright District Council on behalf of Local 1425; Re Ironworkers District Council, B.S.O.I.W., Local 786.....	1357
5. Countryside Farms Limited; Re I.U.O.E., Local 793	1365
6. Globe and Mail, The, Division of Canadian Newspapers Company Limited; Re Southern Ontario Newspaper Guild, Local 87 The Newspaper Guild	1368
7. Grand River Conservation Authority; Re O.P.S.E.U.....	1371
8. Hamilton Yellow Cab Company Limited; Re R.W.D.S.U.....	1373
9. Herbie's Drug Warehouse Limited; Re U.S.W.A.; Re Group of Employees	1393
10. Keswick I.G.A., H.W. Gluck c.o.b. as; Re U.F.C.W. Local 633; Re Group of Employees..	1395
11. Ledcore Industries Limited; Re I.U.O.E., Local 793.....	1399
12. Les Ingenieries Consbec Inc.; Re I.U.O.E., Local 796; Re L.I.U.N.A., Ontario Provincial District Council, L.I.U.N.A., Local 607	1402
13. Lorne's Electric, 291360 Ontario Limited c.o.b. as; Re I.B.E.W., Locals 586 and 594	1405
14. M.L.S. Cable Installations Inc.; Re I.B.E.W., Local 353; Re Group of Employees.....	1413
15. Michipicoten, The Corporation of the Township of; Re U.S.W.A.; Re William A. Lamon..	1419
16. Robin Hood Multifoods Inc. Glassgoods Division; Re Jean Minor; Re U.F.C.W., Local 175	1422
17. Runnymede Development Corporation Ltd.; Re I.U.O.E., Local 793	1423
18. Sault Ste. Marie Board of Education, The; Re O.S.S.T.F.; Re North York Board of Education; Re Wellington County Board of Education.....	1425
19. Taiga Trucking (Ontario) 1980 Inc., et al.; Re I.W.A.	1433
20. Zenith Wood Turners Inc. and 148620 Canada Inc.; Re C.J.A., General Workers' Union, Local 1030	1443

SUBJECT INDEX

- Abandonment - Bargaining Rights - Construction Industry - Whether union had abandoned its bargaining rights in the ICI sector of the construction industry - Employee bargaining agency continuing to exercise its bargaining rights every two years - Union failing to seek enforcement of the provincial agreement - No abandonment of ICI rights
- LORNE'S ELECTRIC, 291360 ONTARIO LIMITED C.O.B. AS; RE I.B.E.W., LOCALS 586 AND 594 1405
- Bargaining Rights - Abandonment - Construction Industry - Whether union had abandoned its bargaining rights in the ICI sector of the construction industry - Employee bargaining agency continuing to exercise its bargaining rights every two years - Union failing to seek enforcement of the provincial agreement - No abandonment of ICI rights
- LORNE'S ELECTRIC, 291360 ONTARIO LIMITED C.O.B. AS; RE I.B.E.W., LOCALS 586 AND 594 1405
- Bargaining Unit - Certification - Dependent Contractor - Related Employer - Union seeking to represent a unit of taxicab drivers and "owner-operators" working "under the banner" of the respondent Yellow Cab - Single car/plate owner-operators found to be dependent contractors - No affirmative evidence that owner-operator/dependent contractors wish to be included in the same unit as the helper-drivers - Two units found to be appropriate, one of dependent contractors and one of drivers - Insufficient evidence that other named respondents are related employers - Matter remitted back to labour relations officer
- HAMILTON YELLOW CAB COMPANY LIMITED; RE R.W.D.S.U. 1373
- Bargaining Unit - Certification - Evidence - Officer conducting inquiry into duties and responsibilities of "Area Superintendents" - Union denied opportunity to call evidence on duties and responsibilities of employees engaged as "Interpreters" - Board finding that such evidence not within the scope of the officer's inquiry but arguable whether evidence respecting borderline positions can have any relevance in a determination under s.1(3)(b) - Issue should not be the subject of a hearing until officer's inquiry completed
- GRAND RIVER CONSERVATION AUTHORITY; RE O.P.S.E.U. 1371
- Bargaining Unit - Certification - Pre-Hearing Vote - *School Boards and Teachers Collective Negotiations Act* - "Bill 100 teacher" and "occasional teacher" not always mutually exclusive categories - Board determining appropriate exclusionary language for occasional teacher bargaining unit - Board declining to set aside vote on basis of inadequate notice of vote, inadequate information on the benefits of collective bargaining or low voter turnout - Certificates issuing
- SAULT STE. MARIE BOARD OF EDUCATION, THE; RE O.S.S.T.F.; RE NORTH YORK BOARD OF EDUCATION; RE WELLINGTON COUNTY BOARD OF EDUCATION 1425
- Bargaining Unit - Certification - Whether meat department in a retail food store an appropriate unit - Applicant having an established history of representing meat department employees - Unit deemed by s.6(3) to be appropriate as a craft unit - Deli employees to be included in unit - Certificate issuing
- KESWICK I.G.A., H.W. GLUCK C.O.B. AS; RE U.F.C.W. LOCAL 633; RE GROUP OF EMPLOYEES 1395
- Bargaining Unit - Certification - Representation Vote - Voter eligibility language interpreted - Whether employee promoted out of bargaining unit between date vote ordered and vote

II

held - Officer ordered to inquire into duties and responsibilities of person in dispute as of vote date	
HERBIE'S DRUG WAREHOUSE LIMITED; RE U.S.W.A.; RE GROUP OF EMPLOYEES	1393
Certification - Bargaining Unit - Dependent Contractor - Related Employer - Union seeking to represent a unit of taxicab drivers and "owner-operators" working "under the banner" of the respondent Yellow Cab - Single car/plate owner-operators found to be dependent contractors - No affirmative evidence that owner-operator/dependent contractors wish to be included in the same unit as the helper-drivers - Two units found to be appropriate, one of dependent contractors and one of drivers - Insufficient evidence that other named respondents are related employers - Matters remitted back to labour relations officer	
HAMILTON YELLOW CAB COMPANY LIMITED; RE R.W.D.S.U.	1373
Certification - Bargaining Unit - Evidence - Officer conducting inquiry into duties and responsibilities of "Area Superintendents" - Union denied opportunity to call evidence on duties and responsibilities of employees engaged as "Interpreters" - Board finding that such evidence not within the scope of the officer's inquiry but arguable whether evidence respecting borderline positions can have any relevance in a determination under s.1(3)(b) - Issue should not be the subject of a hearing until officer's inquiry completed	
GRAND RIVER CONSERVATION AUTHORITY; RE O.P.S.E.U.	1371
Certification - Bargaining Unit - Pre-Hearing Vote - <i>School Boards and Teachers Collective Negotiations Act</i> - "Bill 100 teacher" and "occasional teacher" not always mutually exclusive categories - Board determining appropriate exclusionary language for occasional teacher bargaining unit - Board declining to set aside vote on basis of inadequate notice of vote, inadequate information on the benefits of collective bargaining or low voter turnout - Certificates issuing	
SAULT STE. MARIE BOARD OF EDUCATION, THE; RE O.S.S.T.F.; RE NORTH YORK BOARD OF EDUCATION; RE WELLINGTON COUNTY BOARD OF EDUCATION.....	1425
Certification - Bargaining Unit - Representation Vote - Voter eligibility language interpreted - Whether employee promoted out of bargaining unit between date vote ordered and vote held - Officer ordered to inquire into duties and responsibilities of person in dispute as of vote date	
HERBIE'S DRUG WAREHOUSE LIMITED; RE U.S.W.A.; RE GROUP OF EMPLOYEES.....	1393
Certification - Bargaining Unit - Whether meat department in a retail food store an appropriate unit - Applicant having an established history of representing meat department employees - Unit deemed by s.6(3) to be appropriate as a craft unit - Deli employees to be included in unit - Certificate issuing	
KESWICK I.G.A., H.W. GLUCK C.O.B. AS; RE U.F.C.W. LOCAL 633; RE GROUP OF EMPLOYEES.....	1395
Certification - Collective Agreement - Whether documents to which respondent bound considered to be collective agreements thereby making application untimely - Employees of respondent not constituting an organization of employees and therefore document containing terms and conditions of employment not a collective agreement - Certificate issuing	
MICHIPICOTEN, THE CORPORATION OF THE TOWNSHIP OF; RE U.S.W.A.; RE WILLIAM A. LAMON.....	1419
Certification - Membership Evidence - Parties - Form of evidence acceptable to Board when con-	

sidering intervener status - Labourers' Union claiming intervener status on the ground that it represented employees in the unit - One of the employees for whom evidence was filed was on the employer's list and represented by the Union when the hearing began - Labourers' Union having status to intervene

LES INGENIERIES CONSBEC INC.; RE I.U.O.E., LOCAL 796; RE L.I.U.N.A.,
ONTARIO PROVINCIAL DISTRICT COUNCIL, L.I.U.N.A., LOCAL 607 1402

Certification - Practice and Procedure - Pre-Hearing Vote - Each person on voters list challenged by the employer on the basis of managerial or confidential functions - Board requiring detailed written submissions from parties on the duties and responsibilities of the persons in dispute as well as a detailed statement of material facts before determining procedure for the officer's examinations

ALGOMA STEEL CORPORATION, LIMITED, THE; RE ALGOMA STEEL
FRONT-LINE FOREMEN ASSOCIATION; RE U.S.W.A. AND U.S.W.A., LOCALS
2251, 4509, 5595, 2251, 2288 1341

Certification - Practice and Procedure - Pre-Hearing Vote - Related Employer - Applicant requesting a pre-hearing vote in ten applications for certification - Applicant also seeking a declaration that the respondents constitute one employer - Board analyzing purpose and effect of pre-hearing vote - Effect of s.1(4) application on bargaining unit issue discussed - All drivers voted with ballots cast by employees of any one respondent separated - Ballots cast by persons alleged to be dependent or independent contractors to be segregated

TAIGA TRUCKING (ONTARIO) 1980 INC., ET AL.; RE I.W.A. 1433

Certification Where Act Contravened - Employees laid off in violation of Act - Whether damage done to ability of employees to express wishes repaired by recall of and letter to employees - Small bargaining unit a factor in determining whether a vote would be useful - First contract legislation relevant in assessing the viability of the core of membership support - Certificate issuing pursuant to section 8

ZENITH WOOD TURNERS INC. AND 148620 CANADA INC.; RE C.J.A., GEN-
ERAL WORKERS' UNION, LOCAL 1030 1443

Collective Agreement - Certification - Whether documents to which respondent bound considered to be collective agreements thereby making application untimely - Employees of respondent not constituting an organization of employees and therefore document containing terms and conditions of employment not a collective agreement - Certificate issuing

MICHIPICOTEN, THE CORPORATION OF THE TOWNSHIP OF; RE U.S.W.A.; RE
WILLIAM A. LAMON 1419

Conciliation - Reference - Whether Minister having authority to appoint a conciliation officer when parties have not yet attempted to bargain - Parties need not meet before the Minister can appoint a conciliation officer

COUNTRYSIDE FARMS LIMITED; RE I.U.O.E., LOCAL 793 1365

Construction Industry - Abandonment - Bargaining Rights - Whether union had abandoned its bargaining rights in the ICI sector of the construction industry - Employee bargaining agency continuing to exercise its bargaining rights every two years - Union failing to seek enforcement of the provincial agreement - No abandonment of ICI rights

LORNE'S ELECTRIC, 291360 ONTARIO LIMITED C.O.B. AS; RE I.B.E.W.,
LOCALS 586 AND 594 1405

Construction Industry Grievance - Jurisdictional Dispute - Parties - Work assignment dispute underlying cause of grievance - Whether Board should decide in a grievance the correctness of a work assignment to members of a trade union other than the trade union which is one

IV

of the parties to the grievance - Whether the other trade union should be made a party to the referral for the limited purpose of deciding the correctness of the assignment - Board declining to adjudicate the work assignment dispute in the context of a grievance proceeding - Board refusing to make other union a party to the grievance proceeding	
COPPER CLIFF MECHANICAL CONTRACTORS LTD.; RE MILLWRIGHT DISTRICT COUNCIL ON BEHALF OF LOCAL 1425; RE IRONWORKERS DISTRICT COUNCIL, B.S.O.I.W., LOCAL 786	1357
Construction Industry Grievance - Prohibition in collective agreement from using non-union sub-contractors - Prohibition postponed until later date - Whether collective agreement prohibiting the use of such contracting as of that date regardless of when the sub-contracting arrangements were entered into or whether only restricting the respondent from entering into new sub-contracting arrangements after that date - Intention was that as of that date all non-union contracting work would cease - Violation of collective agreement	
RUNNYMEDE DEVELOPMENT CORPORATION LTD.; RE I.U.O.E., LOCAL 793..	1423
Construction Industry Grievance - Strike - Employer alleging that no strike provision in collective agreement violated - Board finding violation of provision initiated by union representatives at the behest of the union president who was using the powers of his office to punish the employer for refusing to give him an unsecured personal loan - Board making declaration of breach of collective agreement and awarding damages for wages the employer paid to its employees for hours which they did not work	
BELMONT PLASTERING CO., BEN PLASTERING LIMITED, C.O.B. AS; RE DRY-WALL, ACOUSTIC, LATHING AND INSULATION, LOCAL 675, C.J.A.....	1347
Dependent Contractor - Bargaining Unit - Certification - Related Employer - Union seeking to represent a unit of taxicab drivers and "owner-operators" working "under the banner" of the respondent Yellow Cab - Single car/plate owner-operators found to be dependent contractors - No affirmative evidence that owner-operator/dependent contractors wish to be included in the same unit as the helper-drivers - Two units found to be appropriate, one of dependent contractors and one of drivers - Insufficient evidence that other named respondents are related employers - Matter remitted back to labour relations officer	
HAMILTON YELLOW CAB COMPANY LIMITED; RE R.W.D.S.U.	1373
Duty to Bargain in Good Faith - Unfair Labour Practice - Employer refusing to provide, when requested, the salaries being paid to each employee represented by the complainant - Same issue coming up at every negotiating round over the years - Board finding no justification for the notion that individual wage rates are confidential - Union not waiving the right to such information merely because it has bargained with respect to it - Breach of duty	
GLOBE AND MAIL, THE, DIVISION OF CANADIAN NEWSPAPERS COMPANY LIMITED; RE SOUTHERN ONTARIO NEWSPAPER GUILD, LOCAL 87 THE NEWSPAPER GUILD	1368
Evidence - Bargaining Unit - Certification - Officer conducting inquiry into duties and responsibilities of "Area Superintendents" - Union denied opportunity to call evidence on duties and responsibilities of employees engaged as "Interpreters" - Board finding that such evidence not within the scope of the officer's inquiry but arguable whether evidence respecting borderline positions can have any relevance in a determination under s.1(3)(b) - Issue should not be the subject of a hearing until officer's inquiry completed	
GRAND RIVER CONSERVATION AUTHORITY; RE O.P.S.E.U.	1371
Jurisdictional Dispute - Construction Industry Grievance - Parties - Work assignment dispute underlying cause of grievance - Whether Board should decide in a grievance the correctness of a work assignment to members of a trade union other than the trade union which is one	

of the parties to the grievance - Whether the other trade union should be made a party to the referral for the limited purpose of deciding the correctness of the assignment - Board declining to adjudicate the work assignment dispute in the context of a grievance proceeding - Board refusing to make other union a party to the grievance proceeding

COPPER CLIFF MECHANICAL CONTRACTORS LTD.; RE MILLWRIGHT DISTRICT COUNCIL ON BEHALF OF LOCAL 1425; RE IRONWORKERS DISTRICT COUNCIL, B.S.O.I.W., LOCAL 786 1357

Jurisdictional Dispute - Practice and Procedure - Whether Board should entertain second complaint when first complaint dismissed for failure of complainants to appear at hearing - Subject matter of second complaint identical - Board unwilling to bar complaint as being *res judicata* - Having regard to the fact that it was by the complainant's inadvertence that the chance to adjudicate the original complaint on its merits was lost, Board exercising its discretion to not entertain second complaint

CATALYTIC MAINTENANCE INC., PETRO-CANADA PRODUCTS, A DIVISION OF PETRO-CANADA INC., AND E.C.W.U., LOCAL 593; RE U.A., LOCAL 46 1353

Membership Evidence - Certification - Parties - Form of evidence acceptable to Board when considering intervener status - Labourers' Union claiming intervener status on the ground that it represented employees in the unit - One of the employees for whom evidence was filed was on the employer's list and represented by the Union when the hearing began - Labourers' Union having status to intervene

LES INGENIERIES CONSBEC INC.; RE I.U.O.E., LOCAL 796; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL, L.I.U.N.A., LOCAL 607 1402

Parties - Certification - Membership Evidence - Form of evidence acceptable to Board when considering intervener status - Labourers' Union claiming intervener status on the ground that it represented employees in the unit - One of the employees for whom evidence was filed was on the employer's list and represented by the Union when the hearing began - Labourers' Union having status to intervene

LES INGENIERIES CONSBEC INC.; RE I.U.O.E., LOCAL 796; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL, L.I.U.N.A., LOCAL 607 1402

Parties - Construction Industry Grievance - Jurisdictional Dispute - Work assignment dispute underlying cause of grievance - Whether Board should decide in a grievance the correctness of a work assignment to members of a trade union other than the trade union which is one of the parties to the grievance - Whether the other trade union should be made a party to the referral for the limited purpose of deciding the correctness of the assignment - Board declining to adjudicate the work assignment dispute in the context of a grievance proceeding - Board refusing to make other union a party to the grievance proceeding

COPPER CLIFF MECHANICAL CONTRACTORS LTD.; RE MILLWRIGHT DISTRICT COUNCIL ON BEHALF OF LOCAL 1425; RE IRONWORKERS DISTRICT COUNCIL, B.S.O.I.W., LOCAL 786 1357

Practice and Procedure - Certification - Pre-Hearing Vote - Each person on voters list challenged by the employer on the basis of managerial or confidential functions - Board requiring detailed written submissions from parties on the duties and responsibilities of the persons in dispute as well as a detailed statement of material facts before determining procedure for the officer's examinations

ALGOMA STEEL CORPORATION, LIMITED, THE; RE ALGOMA STEEL FRONT-LINE FOREMEN ASSOCIATION; RE U.S.W.A. AND U.S.W.A., LOCALS 2251, 4509, 5595, 2251, 2288 1341

Practice and Procedure - Certification - Pre-Hearing Vote - Related Employer - Applicant

- requesting a pre-hearing vote in ten applications for certification - Applicant also seeking a declaration that the respondents constitute one employer - Board analyzing purpose and effect of pre-hearing vote - Effect of s.1(4) application on bargaining unit issue discussed - All drivers voted with ballots cast by employees of any one respondent separated - Ballots cast by persons alleged to be dependent or independent contractors to be segregated
- TAIGA TRUCKING (ONTARIO) 1980 INC., ET AL.; RE I.W.A. 1433
- Practice and Procedure - Jurisdictional Dispute - Whether Board should entertain second complaint when first complaint dismissed for failure of complainants to appear at hearing - Subject matter of second complaint identical - Board unwilling to bar complaint as being *res judicata* - Having regard to the fact that it was by the complainant's inadvertence that the chance to adjudicate the original complaint on its merits was lost, Board exercising its discretion to not entertain second complaint
- CATALYTIC MAINTENANCE INC., PETRO-CANADA PRODUCTS, A DIVISION OF PETRO-CANADA INC., AND E.C.W.U., LOCAL 593; RE U.A., LOCAL 46 1353
- Pre-Hearing Vote - Bargaining Unit - Certification - *School Boards and Teachers Collective Negotiations Act* - "Bill 100 teacher" and "occasional teacher" not always mutually exclusive categories - Board determining appropriate exclusionary language for occasional teacher bargaining unit - Board declining to set aside vote on basis of inadequate notice of vote, inadequate information on the benefits of collective bargaining or low voter turnout - Certification issuing
- SAULT STE. MARIE BOARD OF EDUCATION, THE; RE O.S.S.T.F.; RE NORTH YORK BOARD OF EDUCATION; RE WELLINGTON COUNTY BOARD OF EDUCATION..... 1425
- Pre-Hearing Vote - Certification - Practice and Procedure - Each person on voters list challenged by the employer on the basis of managerial or confidential functions - Board requiring detailed written submissions from parties on the duties and responsibilities of the persons in dispute as well as a detailed statement of material facts before determining procedure for the officer's examinations
- ALGOMA STEEL CORPORATION, LIMITED, THE; RE ALGOMA STEEL FRONT-LINE FOREMEN ASSOCIATION; RE U.S.W.A. AND U.S.W.A., LOCALS 2251, 4509, 5595, 2251, 2288 1341
- Pre-Hearing Vote - Certification - Practice and Procedure - Related Employer - Applicant requesting a pre-hearing vote in ten applications for certification - Applicant also seeking a declaration that the respondents constitute one employer - Board analyzing purpose and effect of pre-hearing vote - Effect of s.1(4) application on bargaining unit issue discussed - All drivers voted with ballots cast by employees of any one respondent separated - Ballots cast by persons alleged to be dependent or independent contractors to be segregated
- TAIGA TRUCKING (ONTARIO) 1980 INC., ET AL.; RE I.W.A. 1433
- Reference - Conciliation - Whether Minister having authority to appoint a conciliation officer when parties have not yet attempted to bargain - Parties need not meet before the Minister can appoint a conciliation officer
- COUNTRYSIDE FARMS LIMITED; RE I.U.O.E., LOCAL 793..... 1365
- Related Employer - Bargaining Unit - Certification - Dependent Contractor - Union seeking to represent a unit of taxicab drivers and "owner-operators" working "under the banner" of the respondent Yellow Cab - Single car/plate owner-operators found to be dependent contractors - No affirmative evidence that owner-operator/dependent contractors wish to be included in the same unit as the helper-drivers - Two units found to be appropriate, one of

dependent contractors and one of drivers - Insufficient evidence that other named respondents are related employers - Matter remitted back to labour relations officer	
HAMILTON YELLOW CAB COMPANY LIMITED; RE R.W.D.S.U.	1373
Related Employer - Certification - Practice and Procedure - Pre-Hearing Vote - Applicant requesting a pre-hearing vote in ten applications for certification - Applicant also seeking a declaration that the respondents constitute one employer - Board analyzing purpose and effect of pre-hearing vote - Effect of s.1(4) application on bargaining unit issue discussed - All drivers voted with ballots cast by employees of any one respondent separated - Ballots cast by persons alleged to be dependent or independent contractors to be segregated	
TAIGA TRUCKING (ONTARIO) 1980 INC., ET AL.; RE I.W.A.	1433
Representation Vote - Bargaining Unit - Certification - Voter eligibility language interpreted - Whether employee promoted out of bargaining unit between date vote ordered and vote held - Officer ordered to inquire into duties and responsibilities of person in dispute as of vote date	
HERBIE'S DRUG WAREHOUSE LIMITED; RE U.S.W.A.; RE GROUP OF EMPLOYEES.....	1393
Right of Access - Dispute over terms of the access direction - Whether access to bunk house should be limited - Whether hours of access should be restricted - Access order to expire on terminal date fixed in any future certification application	
LEDCORE INDUSTRIES LIMITED; RE I.U.O.E., LOCAL 793	1399
<i>School Boards and Teachers Collective Negotiations Act</i> - Bargaining Unit - Certification - Pre-Hearing Vote - "Bill 100 teacher" and "occasional teacher" not always mutually exclusive categories - Board determining appropriate exclusionary language for occasional teacher bargaining unit - Board declining to set aside vote on basis of inadequate notice of vote, inadequate information on the benefits of collective bargaining or low voter turnout - Certificates issuing	
SAULT STE. MARIE BOARD OF EDUCATION, THE; RE O.S.S.T.F.; RE NORTH YORK BOARD OF EDUCATION; RE WELLINGTON COUNTY BOARD OF EDUCATION.....	1425
Strike - Construction Industry Grievance - Employer alleging that no strike provision in collective agreement violated - Board finding violation of provision initiated by union representatives at the behest of the union president who was using the powers of his office to punish the employer for refusing to give him an unsecured personal loan - Board making declaration of breach of collective agreement and awarding damages for wages the employer paid to its employees for hours which they did not work	
BELMONT PLASTERING CO., BEN PLASTERING LIMITED, C.O.B. AS; RE DRY-WALL, ACOUSTIC, LATHING AND INSULATION, LOCAL 675, C.J.A.....	1347
Termination - Timeliness - Termination application untimely - Dismissal for untimeliness not a bar to a subsequent application	
ROBIN HOOD MULTIFOODS INC. GLASSGOODS DIVISION; RE JEAN MINOR; RE U.F.C.W., LOCAL 175.....	1422
Timeliness - Termination - Termination application untimely - Dismissal for untimeliness not a bar to a subsequent application	
ROBIN HOOD MULTIFOODS INC. GLASSGOODS DIVISION; RE JEAN MINOR; RE U.F.C.W., LOCAL 175.....	1422
Unfair Labour Practice - Duty to Bargain in Good Faith - Employer refusing to provide, when	

VIII

requested, the salaries being paid to each employee represented by the complainant - Same issue coming up at every negotiating round over the years - Board finding no justification for the notion that individual wage rates are confidential - Union not waiving the right to such information merely because it has bargained with respect to it - Breach of duty

GLOBE AND MAIL, THE, DIVISION OF CANADIAN NEWSPAPERS COMPANY LIMITED; RE SOUTHERN ONTARIO NEWSPAPER GUILD, LOCAL 87 THE NEWSPAPER GUILD

1368

Union Successor Status - Transaction constituting a transfer of jurisdiction - Issue of whether employer swept into an ICI provincial agreement to which successor but not predecessor local is a party not relevant to legal question of whether a transfer has occurred - Quality of union representation not relevant - Inappropriate for Board to define specifically the bargaining rights acquired

M.L.S. CABLE INSTALLATIONS INC.; RE I.B.E.W., LOCAL 353; RE GROUP OF EMPLOYEES

1413

1154-87-R Algoma Steel Front-Line Foremen Association, Applicant v. **The Algoma Steel Corporation, Limited**, Respondent v. United Steelworkers of America and United Steelworkers of America, Local 2251, Local 4509, Local 5595, Local 2251 (Sault Marine Services, Limited), Local 2288, Intervener

Certification - Practice and Procedure - Pre-Hearing Vote - Each person on voters list challenged by the employer on the basis of managerial or confidential functions - Board requiring detailed written submissions from parties on the duties and responsibilities of the person in dispute as well as a detailed statement of material facts before determining procedure for the other's examinations

BEFORE: *Patricia Hughes*, Vice-Chair, and Board Members *J. F. Davidson* and *R. R. Montague*.

APPEARANCES: *S. Wahl*, *E. Mitchell*, *C. Swift* and *D. Edwards* for the applicant; *G. F. Luborsky*, *L. W. Fera*, *J. Reynolds* and *W. E. Curtic* for the respondent; *L. A. Richmond*, *J. Cushley* and *A. Lavoie* for the intervener.

DECISION OF THE BOARD; November 25, 1987

1. Between the date of hearing of this matter and the release of this decision, Board Member Davidson passed away. This decision reduces to writing several oral decisions in which Mr. Davidson concurred and it is therefore issued as a decision of the Board.

2. In this application for certification, the Algoma Front-Line Foremen Association ("the Association") requested a pre-hearing representation vote to which Algoma Steel Corporation ("Algoma"), the respondent, objected. After considering the nature of the objections, the Board directed a pre-hearing representation vote (see decision dated August 26, 1987), which was held on September 16 and 17, 1987. Since Algoma maintains that each of the persons in the bargaining unit proposed by the Association exercises managerial or confidential functions, or both, each of the ballots cast was segregated and the ballot box sealed. A hearing was then scheduled to deal with the various matters arising out of the application and the taking of the vote.

3. The issues before us were the following: the status of the Association as a trade union; the status of the persons challenged by Algoma; the entitlement of the Steelworkers of America and various of their Locals as reflected in the style of cause ("the Steelworkers") to intervener status in this matter (such status having been challenged by the Association); the status of twenty-five individuals whom the Association sought to add to the voters list but who Algoma contends are not its employees; and the entitlement to vote of twelve individuals who attended to vote but were not on the voters list. (The twenty-five individuals challenged on the basis of their employment relationship with Algoma and the twelve who attended to vote, were all allowed to vote and their ballots segregated.)

4. This decision sets out oral decisions delivered by the Board with respect to the first four of the issues listed above; the status of the twelve persons not on the voters list was not considered by us during these first two days of hearing into this matter.

5. The first issue before us is the order of proceedings: the Association maintained that we should determine whether the Steelworkers have intervener status in this matter. The Steelworkers argued that the Association, not yet having been found to be a trade union within the meaning of clause 1(1)(p) of the *Labour Relations Act* ("the Act"), does not have status to challenge the Steel-

workers' status. The Steelworkers' claim to intervener status is based on their assertion that should the individuals the Association seeks to represent, or any of them, be found not to be excluded from the Act under section 1(3)(b) of the Act, those persons would properly belong in bargaining units already represented by the Steelworkers. The Association responded that the matter is easily settled: the bargaining unit description proposed by the Association excludes persons already represented by a trade union, that is, by the Steelworkers, and cites *Board of Hospital Trustees of the City of London*, [1970] OLRB Rep. Aug. 579 as authority for that proposition (we note that in that case there was no dispute with respect to any overlap in persons in the applicant's proposed bargaining unit and persons represented by the union seeking intervener status). The employer took no position on the order of proceeding but indicated it will be taking a position on the merits of the Steelworkers' entitlement to intervener status.

6. Having considering the submissions of counsel, we issued the following oral decision:

We see no prejudice to either the proceedings or the applicant in deferring the question of whether the Steelworkers have status as intervener in this matter until a later stage in these proceedings. One of the major questions in this application is whether the persons on whose behalf the applicant seeks certification are managerial or exercise confidential functions. To the extent that this is also relevant to the Steelworkers' status, we believe it would be premature to determine that question at this time. The exclusion from the proposed bargaining unit of persons for whom any trade union held bargaining rights as of the application date appears at first glance a complete answer to the question; however, it is not sufficiently clear to us that there will not arise at a later stage in these proceedings disputes based on or relating to the scope of either the applicant's proposed unit or the Steelworkers' existing units. Thus we are not satisfied that the question could be expeditiously dealt with by assuming that all the persons are not excluded under section 1(3)(b) and then requiring the Steelworkers to show that those persons (or some of them) would fall into their existing units. These matters may have to be dealt with at the end of this application in any case, and therefore we are of the view that it is preferable to defer the matter of the Steelworkers' status until we have determined the status of the disputed individuals, which issue is integral to the determination of this application on the merits.

7. After we gave our decision, we indicated that we were prepared to defer the matter of the Association's status (since it, too, is bound up with the question of whether the disputed persons are managerial) and proceed to deal with the procedure to be followed in determining whether the persons whom the Association seeks to represent are managerial, subject to counsel's submissions to the contrary. Counsel for the Association indicated its concern that it could be successful in this application only to see that accrue to the Steelworkers' benefit. He proposed that the Association show that it has followed the requirements established in the Board's jurisprudence for establishing a trade union, subject to determination at a later stage of the managerial involvement question which must be resolved before the Board can find that the Association is a trade union within the meaning of clause 1(1)(p) of the Act, and that the Steelworkers then show they have status as intervener. The Steelworkers indicated they took no position as to whether we should consider the status of the Association at this point but emphasised that we had already made a ruling on whether we should determine their status at this stage of the proceedings. Algoma emphasised that the Association had to satisfy both prongs of the criteria determining trade union status, the procedures followed by the Association and the nature of its membership. After a short recess to consider counsel's submissions, we informed the parties that we were prepared to permit the Asso-

ciation to show that its procedures had conformed to the requirements established by the Board, should it choose to do so, but that would not establish the Association's status since the important questions of whether its members are managerial remains to be determined. We also stated that we had determined whether we would consider the Steelworkers' status now and had ruled we would not. We point out the obvious: there can be no guarantees of success in a case. An applicant (as well as other parties) must embark on a case in the knowledge that it might fail or that its success may reap few tangible benefits. This applicant is in no different position. After consultation with his client, counsel for the Association advised the Board the Association wished to deal with the first (procedural) part of the status test.

8. Donald Edwards, Secretary of the Association, testified to the procedures followed by the Association at its founding meeting on April 3, 1987. He confirmed that the Minutes of that meeting (Exhibit 1 in these proceedings) is an accurate reflection of what occurred at the meeting; he took and typed the minutes. A Chairman (C. Swift) and Recording Secretary (Mr. Edwards) were acclaimed. Copies of the proposed constitution were distributed to persons present at the meeting and it was reviewed in detail, read and approved. The Constitution contains a clause restricting membership to "employees" which is defined as

any person employed by the Company [The Algoma Steel Corporation Limited], save and except:

(a) persons covered by subsisting collective bargaining relationships between the Company and any other trade union.

(b) persons who are deemed not to be employees under the Labour Relations Act of Ontario.

Officers were elected. The President, C. Swift, and Mr. Edwards, the Secretary, signed the Constitution of which eight copies were made. Registration fees and initiation dues by-laws were passed. The meeting was adjourned. Mr. Edwards typed up the Minutes and Mr. Swift read and signed them; Mr. Edwards also signed them.

9. Mr. Edwards testified that the copies of the Constitution were blank when he distributed them, prior to the original review. He said that he and Mr. Swift dated it "right then and there" when they signed it after its adoption. The date of the Constitution is April 3, 1987. One copy of the signed and dated Constitution was placed in the vault. On cross-examination, he admitted that he had not dated it until he had taken it to the Treasurer at his home, after the meeting, and the Treasurer had pointed out that it had not been dated. An undated but signed copy of the Constitution was filed with the Board; the copy in front of Mr. Edwards during his testimony was the only original placed before us and it was both signed and dated. Counsel for the employer argued that this discrepancy in Mr. Edwards' testimony raises sufficient doubt about the procedures and Mr. Edwards' credibility (particularly since he did not admit he had not dated it at the time of signing until he was under cross-examination and, indeed, testified otherwise in chief) that we should decline to find that the Association has not satisfied the requirements of trade union status. He agreed that if we accept Mr. Edwards' explanation of the discrepancy and find it consistent with the rest of his testimony, that is the end of the matter.

10. After recessing to consider the evidence and submissions, particularly the contradiction in Mr. Edwards' testimony, we made the following oral ruling:

We find that the Algoma Steel Front-Line Foremen Association is a trade union within the meaning of clause 1(1)(p) of the *Labour Relations Act* and became so on April 3, 1987, subject to the Board's determination of the status of the disputed persons in this application. In particular, we are satisfied

that Mr. Edwards' explanation with respect to the date issue is consistent with his testimony about the steps taken by the individuals at the Association's founding meeting and that those individuals followed the steps established by the Board in its jurisprudence with respect to the formation of a trade union. [See *Etna Foods of Windsor Limited*, [1986] OLRB Rep. June 710.]

11. The Board then addressed the question of how to deal with the challenges to the members of the proposed bargaining unit. Algoma contends that they all exercise functions under section 1(3)(b) of the Act and are therefore excluded from the Act. Should they all exercise such functions, the Association would lack trade union status (not being "an organization of employees") and none of these individuals could be the subject of a successful certification application. The Association provided a "breakdown" of the over nine-hundred employees to eleven groups; Algoma claims there are 367 occupational classifications among the employees. Counsel for the Association requested further information about the classification system proposed by Algoma, which was provided by counsel for Algoma. We advised the parties that should they not be able to agree on a classification system or propose an appropriate alternative manner of proceedings, we would consider directing that they file statements of the duties and responsibilities exercised by these employees with the Board. We provided citations for cases in which the Board has made such a direction: *The Toronto General Hospital*, [1986] OLRB Rep. Jan. 176; *Green Gables Manor Incorporated*, [1986] OLRB Rep. May 626; *Ontario Hydro* (June 25, 1987); *Sudbury Algoma Hospital* (April 24, 1987) and *Caterpillar of Canada Ltd.*, [1987] OLRB Rep. Feb. 192. The parties were unable to agree on either of the lists (the Steelworkers supported the Association's list), although all parties agreed that representative persons from each classification or category could be chosen for the purpose of the Officer's examinations. Nor did they propose an alternative approach. The Association and the Steelworkers consented to a direction of the type proposed by the Board; counsel for Algoma made it clear that his client did not. After hearing the submissions of the parties with respect to the procedure proposed by the Board, we made the following direction (the dates specified below were determined on the basis of the parties' submissions on that issue made after we had delivered the direction without specifying dates)

Each person on the voters list has been challenged by the employer on the basis that he or she exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations. In addition, there is a dispute about twenty-five other persons who the respondent contends are not its employees. A further twelve persons attended to vote who were not on the voters list.

It will be necessary for the Board to appoint a Labour Relations Officer(s) to inquire into and report back to the Board on the duties and responsibilities of the persons challenged under section 1(3)(b) of the *Labour Relations Act*, as well as possibly inquire into and report back to the Board on the question of the proper employer of the twenty-five persons disputed on that basis. We have had no submissions on the other twelve employees.

There are over nine hundred persons on the agreed-to voters' list. The employer has classified those persons into 367 occupational classifications; the Association has rationalized the individuals into 11 groups. Neither party is prepared to accede to the other's list. The Steelworkers have expressed agreement with the Association's list. We are not in a position on the basis of the material before us to determine whether either list reflects the appro-

priate “groupings” forming the basis for the required Officer’s examinations. On the other hand, the parties’ efforts to date make it clear that it is not necessary to carry out over 900 individual examinations. We believe that the interests of all parties would be served by direction that the respondent file a statement of the duties and responsibilities and actual exercise of those duties and responsibilities its classification system with reply by the other parties. This type of order has been made by the Board previously as a way of dealing with different situations involving disputed employees. The Board provided the parties with citations of such cases. Counsel for Algoma Steel suggests all these cases have involved exceptional issues, except *Sudbury Algoma Hospital, supra*, which he suggests, by not indicating anything exceptional about that case, contained an inappropriate order. He did not make a submission that there was anything inherently wrong in the Board’s making such an order, only that this case is not an appropriate one in which to do so. The Association and the Steelworkers are in favour of such an order.

The Board may establish the procedures necessary to deal with the case before it. The type of order proposed to the parties by us and upon which we asked them to make submissions does not require “exceptional” circumstances as a pre-condition to its being made. Rather, it focuses the parties on the underlying justification for their objections and permits the Board to make a more reasoned decision about the manner in which the Officers’ examinations are to be conducted.

In this instance, all parties are agreed that the 367 classifications set out by the employer may provide the basis for our direction. We are also satisfied they provide an appropriate basis. Accordingly, we make the following direction:

a) The respondent is to deliver to the other parties and to the Board by January 29, 1988, a statement of the material facts on which it relies for its assertion that each of the 367 occupational categories involve the exercise of managerial functions or confidential functions relating to labour relations.

The statement is to include the duties and responsibilities engaged in by persons in those classifications which warrant their exclusion under section 1(3)(b) of the Act and concrete examples of how such duties and responsibilities are carried out.

b) the respondent is to provide copies to the Board and other parties of documents on which it relies except documents impractical or too extensive to copy or not in its possession, custody or power, also by January 29, 1988.

c) The Steelworkers are to deliver to the other parties and the Board by February 19, 1988, a statement of the material facts on which they rely in response to the respondent’s statement and documents on which it relies as in (b). If that includes a statement of duties and responsibilities, it is to be included. The statement is to indicate

areas of agreement and disagreement with the statement filed by the respondent.

d) The applicant is to deliver to the Board and other parties by March 11, 1988, a statement of the material facts on which it relies in response to the respondent's and Steelworkers' statements and documents on which it relies as in (b) above. If that includes a statement of duties and responsibilities, that is to be included. The statement is to indicate areas of agreement and disagreement with the statements filed by the respondent and the Steelworkers.

e) Should the respondent wish to reply to any of the facts raised by the Steelworkers or the applicant, its reply statement of material fact and documents relied on are to be delivered to the other parties and the Board by April 1, 1988.

f) None of the parties shall adduce evidence of facts or documents not included in or specifically referred to in materials exchanged in accordance with these directions, either during an Officer's inquiry or before a panel of the Board, except with consent of the Board and, if the Board deems it advisable to give such consent, it may do so on such terms and conditions as it considers advisable.

After all the material has been delivered and filed, the parties will be afforded an opportunity to make oral submissions to the Board with respect to manner in which the material should be used to establish a procedure for the examinations, including the number of classifications and persons to be examined from those classifications, by the Officer(s).

It may be that the Board determines, after hearing the parties, that there will have to be 367 examinations; it may determine that fewer would be satisfactory. That will be addressed by the parties at the next hearing. However, this procedure will have allowed us to make our decision on the basis of greater information than we have before us today.

Counsel for the parties indicated that they understood the direction.

12. Counsel for the Association requested that we include the twenty-five persons disputed on the basis of their proper employer in the direction. Counsel for Algoma contended that issue involved an intricate corporate and tax considerations which are better dealt with in evidence before the Board. Association counsel also sought an amendment to the direction requiring "full disclosure" in the statements to be filed with the Board and also sought further information about the data on Algoma's Classification list.

13. We ruled orally that the status of the twenty-five persons would be dealt with in the normal course and could be argued before the Board, initially, at least as a legal question of the relationship between Algoma and the entity purported by Algoma to be those persons' employer. We also declined to add an explicit "full disclosure" requirement to the direction or to direct Algoma to provide the additional information about its classification list since we could not see any relevance of that information to the matter of the section 1(3)(b) functions.

14. We understand that after the hearing adjourned, the Manager of Field Staff advised the

parties that a Senior Labour Relations Officer was available to assist them in satisfying the direction. This offer was of particular relevance to Algoma at this point since it is required to file its statement first. Although we further understand that Algoma did not consider it appropriate to accept that offer at this point, we emphasise to the parties that a senior Labour Relations Officer remains available to assist them should they so request it. In our view, the assistance of a Senior Labour Relations Officer might benefit all the parties to complete what is recognizably a time-consuming but necessary task.

1256-87-G Ben Plastering Limited, carrying on business as Belmont Plastering Co., Applicant v. Drywall, Acoustic, Lathing and Insulation, Local 675, United Brotherhood of Carpenters and Joiners of America, Respondent

Construction Industry Grievance - Strike - Employer alleging that no strike provision in collective agreement violated - Board finding violation of provision initiated by union representatives at the behest of the union president who was using the powers of his office to punish the employer for refusing to give him an unsecured personal loan - Board making declaration of breach of collective agreement and awarding damages for wages the employer paid to its employees for hours which they did not work

BEFORE: *Robert D. Howe*, Vice-Chair, and Board Members *J. A. Ronson* and *J. Redshaw*.

APPEARANCES: *Michael B. Fraleigh*, *Arnold Olyan* and *Fred Bonotto* for the applicant; *Elizabeth M. Mitchell* for the respondent.

DECISION OF THE BOARD; November 20, 1987

1. This is a referral of a grievance to the Board pursuant to section 124 of the *Labour Relations Act*.
2. The grievance was delivered to the respondent (also referred to in this decision as the "Union") on August 6, 1987. Further particulars of the grievance were provided to the respondent by counsel for the applicant (also referred to in this decision as the "Company") in a letter dated August 18, 1987. The Company alleges that the Union has violated Article 4 of the July 7, 1986 to April 30, 1988 collective agreement between the Interior Systems Contractors Association of Ontario and the Union, which provides as follows:

ARTICLE 4 - NO STRIKE - NO LOCKOUT

4.01 There shall be no strike, as defined by the Labour Relations Act by the Union and no lock-out, as defined by the Labour Relations Act by the employer during the terms [sic] of this Agreement.

The applicant and the respondent were bound by that collective agreement at all material times. The remedies sought by the applicant are damages and a declaration that the collective agreement has been violated.

3. This referral was filed with the Board on August 10, 1987. The hearing commenced on August 24 and continued on October 7, 1987. On the first day of hearing, the Board heard the evi-

dence of five witnesses who were called by the Company. At the conclusion of the Company's case, counsel for the Union advised the Board that her client would not be calling any evidence. Since there was not enough time available that day to complete the hearing, the matter was listed for continuation of hearing on October 7, 1987. At the continuation of hearing, counsel for the Union sought to reopen the evidentiary portion of the case for the purpose of introducing a Statement of Claim dated September 28, 1987, which had been issued by Fred Bonotto, the President of the Company, against Gus Simone, the President of the Union. Company counsel objected to the introduction of that document. After hearing and considering submissions regarding that matter, we upheld the objection as we were not satisfied that the Statement of Claim was of any relevance to the instant case. We then proceeded to hear argument regarding the merits of the grievance.

4. The facts set forth in this decision are based upon the candid and credible testimony of the five witnesses called by the applicant, and the inferences which may reasonably be drawn from the totality of the circumstances, including the fact that neither Mr. Simone nor any other Union official testified at the hearing of this matter. Mr. Bonotto, the applicant's first witness, told the Board that at the end of May (of 1987), Mr. Simone asked Mr. Bonotto to lend him \$10,000. Mr. Bonotto did not want to do so, but was afraid, on the basis of previous experience, that if he did not lend him the money, Mr. Simone would "pull the men off the job". Mr. Bonotto spoke with a lawyer regarding Mr. Simone's request, and arranged for a promissory note to be prepared, providing for repayment by Mr. Simone of a ten thousand dollar loan (from the Company) through monthly payments of \$1,000 each, commencing on July 15, 1987, with interest at the rate of 11.5% per annum (which was the interest rate at which the Company borrowed funds from its bank). On the advice of his lawyer, Mr. Bonotto, who had previously lent money to Mr. Simone and not been repaid, requested Mr. Simone to provide the Company with a mortgage on his home as security for the loan. Mr. Simone promised to do so, but failed to honour that promise.

5. After several unsuccessful attempts to contact Mr. Bonotto at the applicant's office between July 10 and 15, Mr. Simone telephoned Mr. Bonotto at home after 10:00 p.m. on July 15 and asked, "Where's the money?" When Mr. Bonotto replied that the money would not be advanced until he provided a collateral mortgage, Mr. Simone told Mr. Bonotto, "I'm going to go all the way. You're going to find out how much it's going to cost you." He also told Mr. Bonotto to drop a contract which Mr. Bonotto had entered into regarding work to be performed in November or December of 1987 at an apartment building project in the Yonge and Sheppard area, because he (Mr. Bonotto) was "not going to have any men to do that building". Following that conversation, Mr. Bonotto called the police (with whom he had previously been in contact regarding Mr. Simone), and arranged for them to be present on the following morning at the Hillcrest Gate project ("Hillcrest") in Richmond Hill, where approximately fourteen Union members were working for the Company.

6. Two Union representatives, Len Ballantyne and Helmut Redermeir, attended at Hillcrest on July 16 prior to the employees' 7:00 a.m. start time, and directed the employees to cease working on that project and to accompany them to the Union office. The reason which they gave employees for directing them to leave the site was that Mr. Bonotto was not remitting to the Union the payments required to provide them with pension and welfare coverage. (Union grievances alleging non-payment of pension and welfare remittances are currently before another panel of the Board, in File Nos. 1129-87-G and 1130-87-G. It is unnecessary, for the purposes of this decision, to determine or comment upon the validity of those grievances.) Messrs. Ballantyne and Redermeir also told the Company's Hillcrest employees that the Union would send them elsewhere to work. Steve Calusic, who was one of the Company's drywall workers on that project (and one of the witnesses who testified in these proceedings), was acting as the foreman at Hillcrest that morning (because the regular foreman was at another job and did not arrive at Hillcrest until later that

day). Mr. Calusic telephoned Mr. Bonotto at home a few minutes before 7:00 o'clock that morning to apprise him of the situation. After telling Mr. Calusic to ask the men to remain at the project until he arrived there, Mr. Bonotto drove directly to Hillcrest. When he reached the project around 8:00 a.m., Mr. Bonotto found Mr. Calusic and about a dozen other employees of the Company sitting in the parking lot. Before speaking with them, Mr. Bonotto talked for ten or fifteen minutes with the police officers who were on the project that morning. He then spoke to the employees and asked Mr. Redermeir, in their presence, what the trouble was. When Mr. Redermeir did not answer, Mr. Bonotto said, "You come to my office and I'll prove what's going on." At Mr. Bonotto's request, the employees followed him to the Company's office on Penne Drive (in the Finch-Weston Road area), which is about a twenty-five minute drive from Hillcrest. At the office, Mr. Bonotto instructed his secretary to photocopy the aforementioned promissory note and to give a copy of it to each employee. When Mr. Redermeir arrived at the office a few minutes later, Mr. Bonotto gave him a copy of the promissory note, and told Mr. Redermeir and the employees about his telephone conversation with Mr. Simone. After reading the promissory note and listening to Mr. Bonotto's description of that telephone conversation, Mr. Redermeir told the workers, "Sorry boys. Go back on the job." Some of them then asked Mr. Redermeir, "Who's going to pay for the time that we lost?" When Mr. Redermeir did not respond, the employees began to argue among themselves. Mr. Bonotto calmed them down by telling them, "Don't worry. I'll look after it." The workers left the office at approximately 11:15 a.m. and returned to Hillcrest, where most of them resumed work after eating lunch. However, Mr. Calusic did not return to work that day. After driving some of the workers back to Hillcrest from Mr. Bonotto's office, he left the project and went home because he did not want to become involved in any controversy with Mr. Simone.

7. Four other persons employed by the Company at Hillcrest (namely, Dobro Bosnjak, Guido Anzivino, Tony Anzivino, and Mike Sikic) also did not work at all on July 16. When Mr. Bosnjak arrived at Hillcrest that morning at approximately 6:45, he was told by some of his fellow employees, "We've had a visit from the Union and we can't work today." He then left the site and returned home. When he was asked (at the hearing of this matter) why he did so, Mr. Bosnjak stated, "Because everyone was leaving so I did also." When the Anzivino brothers arrived at Hillcrest that morning in Guido's car, Messrs. Ballantyne and Redermeir came up to the car and told them that they could not work for the Company because it had "problems" with the Union. Upon hearing that, Guido Anzivino said, "If they have problems, I'll go home." In explaining why he did not work that day, Mr. Anzivino told the Board, "If I'd gone onto the work site they'd have given me a fine."

8. Guido Anzivino, Steve Calusic, and all the other employees were paid for a full day's work in respect of July 16. When he was asked why he was paid for that day, Mr. Anzivino testified as follows: "Because if the Company wouldn't have paid me, I would have gone home because the Union offered me another job." That offer was made to Mr. Anzivino by Mr. Simone on July 18, when Mr. Anzivino returned to Hillcrest to pick up his tools for use at home. (Mr. Simone, who was at the project that morning, told Mr. Anzivino not to work for the Company "because they have problems". He then offered him an opportunity to work for another employer.) Mr. Calusic also received a full day's wages for July 16. In explaining why he did not lose any wages for not working that day, Mr. Calusic testified as follows: "Because I told [Mr. Bonotto] that if he expects me to work for him I've got to be paid for every day.... If he didn't pay me for that day then I would not work for him...."

9. While Mr. Redermeir and the workers from Hillcrest were in his office on July 16, Mr. Bonotto was advised by Chuck Wing, the Company's estimator, that Union officials had attempted to prevent the Company's employees from going to work on two other projects: an apartment

building at Chestnut and Dundas Street (the "Chestnut project"), and an office building on Elizabeth Street. After the Hillcrest workers left his office, Mr. Bonotto contacted Naz Natorianni, a working foreman on those two projects, to find out more about the situation. Mr. Natorianni also testified before the Board in these proceedings. It was his evidence that Louis Jugloff, a Union representative, came to the Chestnut project at about 7:10 a.m. on July 16 and told him and four other Company employees to leave the job. When they asked him why, Mr. Jugloff said that Mr. Simone had told him that the Company had not "sent in their hours" for pension and benefits. In the ensuing discussion, Mr. Natorianni stated that he was not leaving until he and his men were paid for the day. When Mr. Natorianni became aware that Mr. Jugloff had not personally checked to determine whether or not the Company had sent in the remittances in question, Mr. Natorianni asked him to check for them. Mr. Jugloff agreed to do so. The discussion continued, with no work being performed, until Mr. Jugloff left around 8:00 a.m. Following his departure, the five employees resumed work, but their productivity was reduced by about fifty per cent for the balance of the day, as they continued to discuss the situation among themselves. Mr. Jugloff returned to the project on the following day and told them that "all of their hours were in". He also visited the project on July 21 and said, during the course of a conversation with Mr. Natorianni, that the Union had "no right to push [Mr. Natorianni and his men] off the job." In spite of their withdrawal of services and reduced productivity, Mr. Natorianni and the other employees at Chestnut were paid by the Company for a full work day in respect of July 16. When asked what would have happened if the Company had not paid employees their full wages for that day, Mr. Natorianni told the Board, "They'd walk off the job. If there's a problem between the Union and Mr. Bonotto, that's got nothing to do with us. All we care about is our hours, and if our benefits go in."

10. After working on some other jobs on Friday, July 17, and Monday, July 20, Mr. Calusic returned to Hillcrest on July 21. When he arrived at the project at approximately 6:45 that morning, Messrs. Simone and Redermeir approached him and other employees, and told them to leave the project. Once again the reason given for their not being permitted to remain on the project was that the Company had not made the remittances required by the collective agreement. After being called at home that morning and advised of the situation, Mr. Bonotto drove to the Company's office and spoke with Mr. Calusic, who had gone to the office to express his dissatisfaction about being "pursued" by Union representatives on the job site. After speaking with Mr. Calusic, Mr. Bonotto contacted the Company's lawyer at approximately 9:00 a.m., and was advised to direct the employees to return to work. Mr. Bonotto then telephoned the superintendent at Hillcrest, who advised him that Messrs. Simone and Redermeir had left the project between 7:45 and 8:00, but that Mr. Redermeir had returned shortly after 8:00. He also told Mr. Bonotto that Mr. Redermeir had departed from the site at about 9:00 o'clock, after the police arrived, and that the employees had then resumed work. Mr. Calusic remained at the office while Mr. Bonotto telephoned the Company's lawyer, the police, and people at other projects (to determine if the Union had disrupted them too). He then returned to Hillcrest and began to work at approximately 11:00 a.m. He was paid by the Company as if he had worked a full day on July 21, as were all of the other employees on the project.

11. One of the other employees who was approached by Messrs. Simone and Redermeir at Hillcrest on July 21 was Guido Anzivino. In his testimony before the Board, Mr. Anzivino stated that after speaking with Messrs. Simone and Redermeir, he and his brother-in-law "hung around for a bit" and then went for a coffee. When they returned at about 9:15, they saw that the Union representatives had left and that the other employees had started work. Accordingly, they too began to work.

12. On July 21 Dobro Bosnjak was scheduled to work at the Company's Bough Beaches Boulevard project in Mississauga (the "Bough Beaches project"). When he arrived there at 6:45

that morning, a Union representative told him, "You can't start working today." When Mr. Bosnjak asked why, the Union representative replied, "We have a problem with your boss.... Nobody works today. Everyone is at the Union office." After trying unsuccessfully to contact Mr. Bonotto at the Company office, Mr. Bosnjak went to the Union office (at Finch and Keele) and spoke with Mr. Simone. Although no one was there from Mr. Bosnjak's work group, Mr. Simone told him that the others would be arriving soon. Mr. Simone also attempted to persuade Mr. Bosnjak to go to work for another employer, but he declined to do so. After waiting there for an hour and a half, during which no other Company employees arrived despite repeated assurances from Mr. Simone that they were "on their way", Mr. Bosnjak left the Union hall and went to Hillcrest at the suggestion of Mr. Simone, who said, "Take your car and go check at [Hillcrest]. You'll see that no one is working over there." When he arrived at Hillcrest, Mr. Bosnjak found that the employees were working. He then returned to the Bough Beaches project and began work there at about 10:30 a.m. He was paid for the full day, including the three and a half hours that he did not work as a result of going to the Union hall and to Hillcrest. His evidence (in chief) concerning that payment was, "I spoke to my boss and my boss said, 'You can write down the number of hours that you've lost. You'll get paid.'"

13. On the morning of July 21, Mr. Bonotto also spoke with Mr. Jugloff and another Union representative regarding the Chestnut project. They advised him that Mr. Simone had told them to go there and "stop the job", but assured him that although they were going to visit the Chestnut project that morning, they would not interfere with the job. It was Mr. Bonotto's evidence that the Union representatives kept their word in that regard. When he went to the project between 10:30 and 10:45 a.m. "to make sure that the men were working", he found that they were.

14. As indicated above, Article 4.01 of the collective agreement provides that "[t]here shall be no strike, as defined by the Labour Relations Act by the Union ... during the terms [sic] of this Agreement." Section 1(1)(o) of the *Labour Relations Act* defines "strike" as follows:

"strike" includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slow-down or other concerted activity on the part of employees designed to restrict or limit output....

15. The uncontradicted evidence adduced before us in the instant case clearly establishes that employees of the applicant ceased working, or refused to work or to continue to work, in concert or in accordance with a common understanding on July 16 at the Hillcrest and Chestnut projects, and on July 21 at the Hillcrest and Bough Beaches projects. Those work stoppages were instigated by Mr. Simone and by other Union officials acting pursuant to instructions from Mr. Simone. Although the preponderance of arbitration awards dealing with a trade union's liability for damages arising out of a strike prohibited by a collective agreement (and by section 72 of the *Labour Relations Act*) have held that clauses akin to Article 4.01 do not impose strict or absolute liability on a trade union, it is well established that under such a clause a trade union may be made vicariously liable in damages by the conduct of its officers and officials where the clause has been breached: see, for example, *Dominion Bridge Company Limited*, [1983] OLRB Rep. Apr. 503, at paragraph 24, and *Polymer Corp. Ltd.* (1958), 10 L.A.C. 31 (Laskin). As noted by the Board in *Dominion Bridge Company Limited*, [1983] OLRB Rep. Nov. 1801, at paragraph 8, a trade union "has an obligation to enforce a no-strike provision in a collective agreement by refraining from instigating, participating [in] or condoning strikes during the term of a collective agreement; by making reasonable efforts to head off a likely strike; and by acting promptly to end a strike". In the present case, the aforementioned strikes were instigated by Union representatives, in clear violation of Article 4.01. (In view of that conclusion, we find it unnecessary to address Company counsel's submission that the Union also violated Article 13 of the collective agreement, as a

finding that Article 13 had been contravened would not expand the scope of the appropriate remedial relief in the circumstances of this case.)

16. The particulars filed by counsel for the Company also allege that Mr. Simone interrupted Guido Anzivino in the performance of his work at Hillcrest on July 18, and that on July 21, a Union representative interfered with five of the Company's employees in the performance of their work at the Chestnut project. However, as contended by counsel for the Union, those allegations are not supported by the evidence adduced before us in these proceedings. As noted above, Mr. Anzivino encountered Mr. Simone when he went to Hillcrest on Saturday, July 18. However, there is no evidence that Mr. Anzivino was supposed to be working there that day. The only evidence regarding the purpose of his visit to the project on July 18 is his testimony that he went there to pick up his tools for use at home. With respect to the Chestnut project, as indicated above, the evidence indicates that although Mr. Jugloff and another Union representative visited the site on July 21, they did not "stop the job" or otherwise interfere with the performance of work by the Company's employees.

17. Counsel for the Union asked the Board to refrain from granting a declaration in the circumstances of this case, on the basis that the case involves only a "technical breach". However, we find no merit in that submission. The evidence adduced before us establishes a number of flagrant contraventions of Article 4.01, initiated by Union representatives at the behest of the Union President, who was using the powers of his office to punish Mr. Bonotto for refusing to give him an unsecured personal loan of \$10,000. Under the circumstances, a declaration is clearly warranted, as is an order that the Union compensate the Company for all losses sustained by it as a result of the Union's contraventions of Article 4.01, including the wages which the Company paid to its employees for hours which they did not work on July 16 and 21. In this regard, we are satisfied on the totality of the evidence that Mr. Bonotto acted reasonably in authorizing those payments with a view to retaining the Company's work force and restoring normal operations as soon as possible. The same is true of Mr. Bonotto's request that the striking employees (and Mr. Redermeir) follow him to the Company office on July 16, so that he could show them the aforementioned promissory note and thereby "prove" what was going on. Accordingly, we reject Union counsel's submission that the respondent should not be liable for any losses incurred by the Company during that period.

18. We are also unpersuaded by Union counsel's submission that Mr. Bosnjak was not involved in a concerted work stoppage on July 21. Although he was the only employee who left the Bough Beaches project that morning, he did so because of a directive given to him by a Union representative, who advised him that no one would be working for the Company that day, and that everyone would be at the Union office. At or about the same time, Messrs. Simone and Redermeir were at Hillcrest directing employees to leave that project. As noted above, some of them did so, while others remained at Hillcrest but did not commence work until about 9:00 a.m. Thus, in leaving the Bough Beaches project that morning, Mr. Bosnjak not only believed himself to be, but also was in fact, acting in concert with other employees or in accordance with a common understanding.

19. For the foregoing reasons, the Board hereby declares that the respondent, through its President and its aforementioned business representatives, violated Article 4.01 of the collective agreement by instigating strikes at the applicant's Hillcrest and Chestnut projects on July 16, 1987, and at the applicant's Hillcrest and Bough Beaches projects on July 21, 1987. Furthermore, we hereby direct the respondent to compensate the applicant for all losses sustained by it as a result of the applicant's contraventions of Article 4.01, including the wages which the applicant paid to its employees on those projects for hours which they did not work on those days.

20. The Board will remain seized of this matter for the purpose of resolving any disputes which may arise between the parties with respect to quantification of the Board's compensation order.

1710-87-JD United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and its Local 46, Complainants v. **Catalytic Maintenance Inc.**, Petro-Canada Products, A Division of Petro-Canada Inc., and Energy and Chemical Workers Union, Local 593, Respondents

Jurisdictional Dispute - Practice and Procedure - Whether Board should entertain second complaint when first complaint dismissed for failure of complainants to appear at hearing - Subject matter of second complaint identical - Board unwilling to bar complaint as being *res judicata* - Having regard to the fact that it was by the complainants' inadvertence that the chance to adjudicate the original complaint on its merits was lost, Board exercising its discretion to not entertain second complaint

BEFORE: *N. B. Satterfield*, Vice-Chair, and Board Members *R. M. Sloan* and *H. Kobryn*.

APPEARANCES: *L. C. Arnold* and *W. Weatherup* for the complainant; *Robert A. Macpherson*, *Elizabeth Koester* and *Al Conquergood* for Petro-Canada Products, A Division of Petro-Canada Inc.; *Paul Young* and *Dan Nowlan* for Catalytic Maintenance Inc.; *Daniel Ublansky* for Energy and Chemical Workers Union, Local 593.

DECISION OF THE BOARD; November 19, 1987

1. The names: "Stearns Catalytic Ltd., Petro-Canada Products Limited, and Energy and Chemical Workers Union" appearing in the style of cause of this complaint as the names of the respondents are amended to read respectively: "Catalytic Maintenance Inc., Petro-Canada Products, A Division of Petro-Canada Inc., and Energy and Chemical Workers Union, Local 593". For ease of reference, the Board will refer to these three respondents respectively as Catalytic, Petro-Canada and Local 593.

2. This complaint has been made under section 91 of the *Labour Relations Act* and it alleges that certain work assigned by Catalytic or Petro-Canada to persons represented by Local 593 should have been assigned to persons represented by the complainants.

3. The respondents object to the Board entertaining the complaint on the ground that it raises the identical issue raised in an earlier complaint in File No. 0849-87-JD. It had been filed on June 23, 1987 and the Board had set July 13, 1987, as the date for a pre-hearing conference into the complaint. A pre-hearing conference is conducted by a Vice-Chair of the Board who will not be a member of the panel hearing the complaint if it proceeds to hearing on its merits. The purpose of the pre-hearing conference is to identify and attempt to simplify the issues of the case, to exchange documents on which parties will be relying, to attempt agreement on the facts and other matters and generally to expedite the hearing of the complaint. When the respondents and other interested parties are served notice of the complaint, they are advised in a letter from the Registrar

of the Board's intention to convene a pre-hearing conference before a Vice-Chair of the Board. They also are forewarned that, should anyone object to the Board proceeding under section 91 of the Act, the objecting party has the obligation of notifying the Board and all other interested parties of its objection and the material facts upon which it intends to rely. The parties are also notified that the Board will entertain such objection at the outset of the pre-hearing conference. In such circumstances, however, a Vice-Chair of the Board is not a quorum of the Board for purposes of considering the objection. Therefore, a panel of the Board is struck to deal with that issue and the pre-hearing conference will only be convened if the Board panel finds that the Board has jurisdiction to entertain the complaint and should exercise its discretion under subsection 1 of section 91 to do so.

4. The replies to the first complaint filed by the respondents either challenged the Board's jurisdiction to proceed under section 91 or requested the Board to exercise its discretion under subsection 1 of section 91 to not entertain the complaint. For that reason, a panel of the Board was struck to deal with those challenges. On July 13, 1987, the complainants failed to appear at the hearing and the Board dismissed the complaint by a decision given orally at the hearing.

5. The complainants subsequently requested the Board to reconsider its decision on the ground that they had not received the Board's notice of the hearing. The Board brought the complaint back on for hearing on September 21, 1987, to deal with the complainants' request for reconsideration. Counsel for Local 593 took no position on the issues at the hearing. Counsel for the two corporate respondents were satisfied on the representations of complainants' counsel that notice of the pre-hearing conference had not been received by the complainants' solicitors on record at that time. The Board heard evidence with respect to whether the two complainants had received notice and a majority of the Board was not satisfied that neither complainant had received the Board's notice of the pre-hearing conference. As a result, the Board declined to reconsider and vary or revoke the decision made orally on July 13, 1987, and thereby confirmed that decision.

6. The Board's decision declining to reconsider the earlier complaint issued September 28, 1987. The instant complaint was made with the Board on September 23, 1987. On October 7, 1987, the Registrar served notice on the parties that the Board would convene a pre-hearing conference on the complaint before a Vice-Chair of the Board. Once more the two corporate respondents disputed the Board's jurisdiction to entertain the complaint and, should the Board find it had jurisdiction, objected to the Board exercising its discretion under subsection 1 of section 91 of the Act to entertain the complaint. Their objections were based on the same grounds raised in the first complaint and on additional grounds. The additional grounds were that the complaint is *res judicata* because the same complaint between the same parties had been dismissed by the Board in its decisions respecting the first complaint, and that this complaint represented an abuse of the Board's process and, therefore, should be dismissed without a hearing. In view of those objections, the Board again struck a panel to deal with them on October 21, 1987, the date on which a pre-hearing conference was to be convened before a Vice-Chair of the Board.

7. On October 21st, the Board heard the complete and able submissions of all parties on the issues of whether the Board had jurisdiction under subsection 1 of section 91 of the Act to entertain the complaint and, if it did, whether it should exercise its discretion to do so. The Board has reviewed and carefully weighed the parties' submissions. As one would expect, counsel for the complainants argued that the Board had jurisdiction to entertain this complaint and that the complainants were entitled to have the complaint adjudicated on its merits, something not yet done. Except for the fact that Local 593 did not support the contention that this complaint was *res judicata*, the respondents were pursuing the same objections and were supportive of each others

submissions as to why the Board either lacked jurisdiction to hear the complaint or should exercise its discretion to refuse to entertain it.

8. It is not disputed that the subject matter of this complaint is identical to the earlier one. While the Schedule attached to the complaint is not worded precisely the same as the Schedule to the earlier one, it contains no material differences. The work in dispute in both complaints is the same and had been completed prior to the making of the first complaint.

9. The Board turns first to the issue of whether the Board should apply the doctrine of *res judicata* as a bar to entertaining the complaint. The Board has applied that doctrine for many years. The Board's decision in *Oakwood Park Lodge*, [1980] OLRB Rep. Oct. 1501, beginning at paragraph 7, reviews the practical and policy grounds for utilizing the doctrine and some of the history of its application by the Board. The Board herein does not agree that the doctrine should be applied in this case. The reasons given by the Board as constituted in the two decisions which have issued respecting the earlier complaint make it clear that it was dismissed, in the first instance, because of the complainants' failure to appear at the pre-hearing conference scheduled for the complaint, and, in the second instance, because the Board was not satisfied that the complainants' failure to appear was the result of them not having been served notice of the hearing. The Board herein is entitled to assume that the earlier complaint was dismissed properly for the reasons stated in those decisions. In this respect, see the Board's decision in *M. Sullivan and Son Limited*, [1979] OLRB Rep. Jan. 58, at paragraph 8. While the Board's decisions dismissing the earlier complaint may be seen as dismissing the complaint for want of prosecution, in this Board's view, those decisions do not amount to an adjudication of the subject matter of the complaint on its merits. The disposition of an issue on its merits has been a pre-condition in those cases where the Board has relied on the doctrine of *res judicata* to bar a new application or complaint. That pre-condition is absent here.

10. Subsection 1 of section 91 of the Act gives the Board a general discretion whether to entertain a complaint which it would otherwise have jurisdiction to entertain under section 91. While the Board is unwilling to bar this complaint as being *res judicata*, that does not decide the exercise of the Board's general discretion pursuant to subsection 1. As the Board has noted above, there is no dispute that the work at issue in this complaint is identical to the work in dispute in the earlier one. That work had been completed more than three weeks prior to the making of the earlier complaint. Nor was the same or similar work being done at the time this complaint was brought or when it came on for hearing. In fact, the second complaint reveals no change in material circumstances from the earlier one. There can be no doubt that the complainants had the opportunity to have the earlier complaint adjudicated on its merits and lost that opportunity solely because of their own failure to appear at the scheduled hearing. This complaint was brought two days after the Board dismissed orally the complainants' request that the Board revoke its decision dismissing the first one. Since there has been no material change in circumstances between the making of the two complaints, the making of this one is tantamount to seeking to have the Board reconsider its decision denying the complainants' request that the Board revoke its decision dismissing the first complaint. Apropos of which, counsel for Local 593 made a telling comment in his submissions asking the Board not to entertain this complaint when he remarked to the Board that he would find it untenable, having succeeded in a complaint or application against an employer, to be dragged back to the Board by tactics like those employed by the complainants in this case.

11. The circumstances in which this complaint has been made are quite analagous to the circumstances facing the Board in *M. Sullivan*, *supra*. In that case, the Board was faced with deciding whether to exercise its general discretion under what is now section 89(4) of the Act to entertain two new complaints which, taken together, were "virtually identical" to an earlier one. The earlier

complaint had been dismissed because the complainant, through its own inadvertence, had failed to appear at the hearing scheduled for the complaint. There had been no request to reconsider the decision dismissing the earlier complaint, so the Board hearing the new ones first treated them as a request for reconsideration of the earlier decision. At paragraph 26 of its decision, the Board expressed the view that the interests of sound industrial relations policy and the orderly administration of the *Labour Relations Act* required care by parties to ensure that they attended all Board hearings; and, furthermore, "... where a complaint is dismissed because of a failure of a complainant to attend at the hearing, or a complaint is upheld in the absence of the respondent, as a general principle, the Board should not permit the subject matter of the complaint to be re-opened unless sufficient grounds for so doing have been advanced by the absent party." The Board in that case was not satisfied that sufficient grounds had been advanced for it to overlook the fact that it was by the complainant's own inadvertence that the chance to adjudicate the original complaint on its merits was lost. The Board concluded, therefore, that it should not inquire into the subject matter of the original complaint. As a result, the Board declined to reconsider the decision to dismiss the original complaint and to inquire into the two new complaints. The Board herein agrees with counsel for all three respondents that the factors relied on by the Board in *M. Sullivan, supra*, in coming to that decision and the general principle stated at paragraph 26, are equally applicable to the circumstances of this complaint.

12. Counsel for the complainants argued that the Board in *M. Sullivan, supra*, did not take into account an earlier Board decision in *The Becker Milk Company Limited*, [1974] OLRB Rep. Sept. 621 in which the Board exercised its discretion under what is now section 89(4) of the Act to refuse to entertain two new complaints which were identical to an earlier one which had been dismissed. The complainant in the earlier complaint had sought to withdraw its complaint after a request at hearing for an adjournment had been refused by the Board, absent consent of the respondent. The new complaints were challenged on two grounds: *res judicata* and abuse of the Board's process. The Board rejected both grounds and directed that the complaint be heard on its merits. While the decision gives the Board's reasons for rejecting the two grounds challenging the new complaints, it gives no reasons for the Board exercising its discretion to entertain them; in other words, it is silent with respect to whether the Board considered if the two complainants had provided it with sufficient grounds for reopening the subject matter of the earlier complaint. For that reason, the Board herein finds the decision in *M. Sullivan, supra* to be more helpful.

13. The Board is not persuaded by any of the arguments advanced by the complainants that, by reopening the subject matter of the original complaint, any good industrial relations purpose would be served which would outweigh the benefit obtained by the avoidance of delays in starting Board hearings caused by the absence of a party or by a party not being willing or prepared to proceed. Nor is the Board satisfied that reopening the subject matter of the original complaint would serve any good industrial relations purpose which would outweigh the need for certainty and finality in the Board's decisions. Therefore, having regard for the fact that the complainants' opportunity to have the complaint adjudicated on its merits in the first instance was lost by their own inadvertence and pursuant to the Board's general discretion under subsection 1 of section 91 of the Act, the Board declines to entertain this complaint.

0979-87-G Millwright District Council on behalf of Local 1425, Applicant v. **Copper Cliff Mechanical Contractors Ltd.**, Respondent v. Ironworkers District Council; International Association of Bridge, Structural and Ornamental Ironworkers, Local 786, Interveners

Construction Industry Grievance - Jurisdictional Dispute - Parties - Work assignment dispute underlying cause of grievance - Whether Board should decide in a grievance the correctness of a work assignment to members of a trade union other than the trade union which is one of the parties to the grievance - Whether the other trade union should be made a party to the referral for the limited purpose of deciding the correctness of the assignment - Board declining to adjudicate the work assignment dispute in the context of a grievance proceeding - Board refusing to make other union a party to the grievance proceeding

BEFORE: *N. B. Satterfield*, Vice-Chair, and Board Members *J. Davidson* and *B. L. Armstrong*.

DECISION OF THE BOARD; November 16, 1987

1. The name of the respondent appearing in the style of cause of this application has been amended to read: "Copper Cliff Mechanical Contractors Ltd."

2. The applicant Millwright District Council on behalf of Local 1425 ("the Millwrights") has referred a grievance in the construction industry to the Board for final and binding arbitration pursuant to section 124 of the *Labour Relations Act*. An interim decision on a procedural dispute issued July 27, 1987. The instant decision deals with the important issue of whether the Board should decide in a proceeding under section 124, the correctness of a work assignment to members of a trade union other than the trade union which is one of the parties to the grievance, when it is alleged the assignment has been made pursuant to a collective agreement other than the one under which the grievance arose. It deals as well with the related question of whether the other trade union should be made a party to the referral for the limited purpose of deciding the correctness of the assignment.

3. The Millwrights and the respondent, Copper Cliff Mechanical Contractors Ltd., ("the Company"), are bound to the provincial agreement between the Association of Millwrighting Contractors of Ontario, Inc. and the Millwright District Council of Ontario effective from June 23rd, 1986 to April 30th, 1988, ("the Millwrights Agreement"). The Company and the Ironworkers District Council ("the Ironworkers Council") and the International Association of Bridge, Structural and Ornamental Ironworkers, Local 786 ("Ironworkers Local 786"), are bound to the provincial agreement between the Ontario Erectors Association, Incorporated, the Ontario Erectors Association and the International Association of Bridge, Structural and Ornamental Ironworkers and the Ironworkers District Council of Ontario ("the Ironworkers Agreement"). The Board will refer to the Ironworkers Council and Ironworkers, Local 786 as "the Ironworkers" when the text requires that they be referred to collectively. The Ironworkers are seeking status in this proceeding for the purpose of pursuing the claim that the grievance is really a dispute over the assignment of work to members of the Ironworkers.

4. The Board issued a decision July 27, 1987, to defer hearing of the referral for the reasons given in the decision. The Millwrights had been opposed to the Board doing so on the grounds summarized at paragraphs 4 and 5 of the decision which state as follows:

4. At the hearing, counsel for the Millwrights informed the Board that it was content to have the Ironworkers made a party to the proceedings under section 124 of the Act and was prepared to

have the Board hear and decide the conflicting claims of the two trade unions that the company should perform the work under the terms of their respective collective agreements. The reason why the applicant is prepared to proceed in this manner is because it wants a determination of the issue and is concerned that a deferral to either a complaint made under section 91 of the Act or to the Plan [for the Settlement of Jurisdictional Disputes in the Construction Industry] would result in the issue not being adjudicated at all. There are two reasons why the applicant holds that view. First, since the job is almost completed, the applicant believes that the dispute would not be adjudicated under the Plan. Second, if a complaint is made under section 91 of the Act, and even if the Board found that there was a dispute about a work assignment, it likely would find also that it was deprived of jurisdiction to entertain the complaint by operation of section 91(14) of the Act. That section deprives the Board of jurisdiction where the collective agreements binding upon the employer and trade union parties to the complaint contain provisions requiring the reference of differences between them arising out of work assignments to a tribunal mutually selected by them of any differences as to work assignment that can be resolved under the collective agreement.

5. Counsel for the Millwrights submits that the Board previously has signified that it would be prepared to give an intervener status in a section 124 proceeding for the limited purpose of participating in the argument concerning the assignment of work and the jurisdiction of the intervening trade union with respect to the assignment of work. Counsel further contends that the same panel of the Board was prepared to entertain submissions from the intervening trade union, as well as the applicant and the respondent to the referral, on the propriety of the employer having assigned the work under provisions of the collective agreement binding upon the employer and the applicant trade union instead of the intervening trade union's collective agreement. Counsel referred the Board to the unreported decisions of the Board, differently constituted, in *Lackie Industrial Contractors Limited*, issued August 26th, 1985 ("*Lackie No. 1*"), application for reconsideration refused in a decision which issued November 29, 1985 ("*Lackie No. 2*").

Because of the position taken by counsel for the Millwrights, the Board heard the full submissions from counsel for all three parties and then ruled that it would defer hearing the grievance referred to it in order to allow the Company a specified period of time to apply to the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry ("the Plan") for a resolution of the assignment of the work at issue in the grievance. The Board reserved its decision on whether it would adopt the procedure referred to in *Lackie No. 1*, *supra*, and entertain submissions on the proper assignment of the work at issue in the context of this proceeding under section 124 of the Act.

5. The Company did apply to the Plan within the period allowed by the Board. Subsequently, and before the Board had issued any decision on whether it would adopt the procedure referred to in *Lackie No. 1*, *supra*, the solicitors for the Millwrights advised the Board by letter dated September 18, 1987, that the dispute would not be adjudicated under the Plan because the work in dispute had been completed. The last paragraph of the letter states:

It has now become clear, as it was in the *Lackie* case (a case dealing with the same collective agreements as in the present case), that the only forum remaining in which the Applicant may seek adjudication of the issues raised by its grievance is before the Board. Therefore, the Applicant hereby requests that the Board reconvene in order to determine the subject grievance.

Accordingly, the Board must decide whether it should adopt the procedure referred to in *Lackie No. 1* and deal with the work assignment dispute in the context of this section 124 proceeding and make the Ironworkers parties to the proceeding for the purpose of participating in the submissions on that dispute.

6. While the Millwrights and Ironworkers disagreed on whether the Board should defer deciding the grievance referred to it pending a reference of the work assignment dispute to the Plan or to section 91 of the *Labour Relations Act*, Ironworkers' counsel agreed with Millwrights'

counsel that, should the dispute not be resolved by the Plan or pursuant to section 91 of the Act, the Board herein should decide in this proceeding under section 124 of the Act whether the work should have been assigned under the Millwrights agreement rather than under the Ironworkers agreement. Counsel for both of those parties read *Lackie No. 1* as saying that, where the underlying cause of the grievance is a dispute over a work assignment, the Board would decide the correctness of the work assignment in the proceeding under section 124 based on the evidence and representations of the direct parties to the referral, that is, the applicant and the respondent, and of the trade union to whose members the work had been assigned.

7. The *Lackie* case involved the same two trades as in the instant case, but in reversed roles. A sister local of the Ironworkers Local 786 was the applicant. The Millwrights union was the party seeking to intervene in the section 124 proceeding and was the union whose members had been assigned the work at issue. It would appear that the Board gave the Millwrights status for the limited purpose of arguing its claim that the grievance was rooted in a work assignment dispute. The respondent Lackie had raised the same issue as a defense to the grievance. The Board adjourned the section 124 proceedings for two weeks in order to allow a complaint to be filed under section 91 of the *Labour Relations Act* or for the dispute to be referred to some other jurisdiction dispute settlement tribunal. It is reasonable to assume from the decision, as the Millwrights and Ironworkers maintain, that the Board's reference to another tribunal was a reference to the Plan. The section 124 proceedings were to be resumed if proceedings under section 91 or the Plan were not commenced within the two week period allowed, or if they were commenced and not adjudicated. Having stated that position, the Board went on at paragraphs 2, 3 and 4 of the decision to comment as follows:

2. In indicating its concern that the jurisdictional issue be adjudicated, the Board noted that the Board's policy of deferring to a jurisdictional tribunal in section 124 grievances to arbitration has its roots in a notion that where there are competing jurisdictional trade claims between construction trade unions, the Board under section 124 would not adjudicate the jurisdictional dispute in the absence of one of the affected trade unions. Accordingly, the Board normally defers to a complaint under section 91 which procedure allows for the participation of all interested parties. This ensures a complete and fair adjudication of the jurisdictional issue.

3. In the present case, however, we are concerned that such an adjudication may not occur. In the event that there is no such adjudication, it is our view that the proper way to proceed in these matters would be to allow the Millwrights' District Council to have status in these proceedings for the limited purpose of participating in the argument concerning the assignment of work and the jurisdiction of the Millwrights' Council with respect to such an assignment.

4. The representation by the respondent in these proceedings that the issue between the parties is properly a jurisdictional dispute, in the context of a section 124 grievance, is in effect a form of defence to the grievance. That is to say that when an employer raises the jurisdictional issue, the employer is saying in effect the reason the work was not assigned as claimed by the grievor is that it was properly assigned to another trade union and therefore the grievance should not succeed. In order to deal with such a defence to a grievance it is clear that this Board must either adjudicate the matter itself or defer to an adjudication by some other tribunal or in some other proceedings. It is our view, however, that if the respondent or the Millwrights' District Council do not avail themselves with that, then we would be prepared to entertain submissions on the proper assignment in the context of these proceedings.

8. Counsel for both trade unions view the Board in *Lackie No. 1* as saying that, in the event that the work assignment dispute is not adjudicated either by the Board under section 91 of the Act or by another tribunal, the Board would hear and decide, in the context of the section 124 proceeding, whether the union raising the jurisdictional dispute defense, in other words, the one whose members have been assigned the work, had a valid claim to the work under its collective agreement. The Board would achieve this by allowing that trade union status in the grievance pro-

ceeding for that limited purpose. Counsel for the Ironworkers in the instant proceedings, argues that the procedure proposed in *Lackie No. 1* is a practical one because it would avoid letting anyone of the parties interested in a work assignment dispute frustrate getting the dispute before a tribunal which would decide the issue. He argues further that the procedure proposed by the Board in *Lackie No. 1* is a logical extension of an arbitrator's powers as defined by arbitrators, including this Board when it has sat as an arbitrator, and the courts, in a series of awards and judgements which he cited to the Board in the hearing. Therefore, he joins counsel for the Millwrights in urging the Board to adopt the same approach in the instant referral should the dispute not be adjudicated either by the Plan or under section 91. The concern of the Board in *Lackie No. 1* and of the Millwrights and Ironworkers herein, that the work assignment dispute might not be adjudicated under section 91 of the Act arises from the conditions in the Millwrights and Ironworkers collective agreements which provide for such disputes to be referred to the Plan for resolution. The Board has previously found the same or similar language to trigger subsection 14 of section 91. That provision of the Act deprives the Board of jurisdiction to entertain a complaint under subsection 1 of section 91 even where all of the requisite conditions are present for a complaint to be made under that section. See, for example, the Board's decision in *Stoney Creek Mechanical Limited*, [1982] OLRB Rep. Dec. 1917, the decisions referred to therein at paragraphs 15 and 17 and the Board's decision in *Electrical Power Systems Construction Association*, [1987] OLRB Rep. Apr. 487.

9. It is not entirely clear to the Board herein, what was meant to be the extent of the inquiry by the Board in *Lackie No. 1* into the propriety of the work assignment which was raised as a defense to the grievance. On the one hand, paragraph 3, the penultimate paragraph of the decision, can be read as limiting the inquiry to one of whether the collective agreement binding upon the Millwrights, the intervening trade union and the one to whose members the work had been assigned by Lackie, required Lackie to make that assignment as it and the Millwrights were claiming. On the other hand, the reference in the last sentence of paragraph 4, the final paragraph of the decision, to the Board being "...prepared to entertain submissions on the proper assignment in the context of these proceedings.", arguably could mean that the Board intended to inquire into which of the two trade unions, the Ironworkers or the Millwrights, had the better claim to the work. That would be the purpose of an inquiry under section 91(1) of the Act if the dispute could be entertained by the Board under that section. Whichever type of inquiry the Board was contemplating in *Lackie No. 1*, the Board herein is not satisfied on several grounds that it should engage in any inquiry under this section 124 proceeding which would require that the Ironworkers be made a party to the proceeding even if the Board had the consent of the Company, the Millwrights and the Ironworkers.

10. First, if the Board in *Lackie No. 1* was contemplating making the Millwrights a party to that proceeding solely for the purpose of enquiring into whether the Millwright agreement had required Lackie to assign the disputed work to the Millwrights, the Board herein is not convinced that the application of that approach to this case would resolve either the grievance or the work assignment dispute. Since the dispute has arisen at all, it is to be presumed that both unions believe that their collective agreements cover the work. Even if the Ironworkers agreement does contain language which would support a conclusion that the Company was obligated to assign the work to members of the Ironworkers, that would not preclude the possibility that the Company had the same obligation with respect to the Millwrights under the Millwrights agreement. This is not an uncommon circumstance for a contractor who has collective agreements with more than one building trade union. It results from the fact that the constitutions, and, therefore, very often the collective agreements of the building trade unions express rather sweeping work jurisdiction claims which sometimes partially overlap. When that occurs, until one of the trade unions establishes the better claim for the work, the employer is at risk of being in violation of one of its collective agreements regardless of which union's members get the work which both claim. This would appear to

be the position that the Company is in with the Millwrights and the Ironworkers. Therefore, if the Company was obliged by the Ironworkers agreement to assign the work to its members, it would not be a complete defence to the Millwrights' grievance because the obligation, by itself, would be irrelevant to the issue of whether the Company has the same obligation under the Millwrights agreement and, therefore, was in violation of the agreement when it failed to assign the work to members of the Millwrights. Nor would the existence of language in the Ironworkers agreement expressly claiming the work in dispute preserve that work for the members of the Ironworkers. That would be so whether or not the Millwrights agreement expressly claimed the work as well. Work jurisdiction claims in the construction industry are not resolved simply on what the constitutions and collective agreements of the disputing trade unions say or fail to say about the work at issue. While the presence of particular language in a constitution and collective agreement of a trade union may favour its claim over that of another trade union, work jurisdiction claims are usually settled after weighing a number of factors. Therefore, where a work assignment dispute underlies a grievance, making the trade union to whose members the work has been assigned a party to the arbitration would have no probative value respecting either the grievance or the competing claims for the work. Accordingly, it is unlikely that the Board in *Lackie No. 1* intended to give the Ironworkers in that case standing in the proceedings solely for the purpose of deciding whether its agreement required Lackie to assign the work to members of the Ironworkers, and the Board herein will not adopt such an approach.

11. The other grounds for declining to use this section 124 proceeding for anything other than the purpose of arbitrating the grievance between the Millwrights and the Company, relate to the proposition that the Board use the proceeding to decide which of the Millwrights or the Ironworkers has the better claim to the disputed work. In order to provide a context for discussing the Board's grounds for refusing to do as the Millwrights and the Ironworkers request, it is useful to examine what it is that makes a work assignment dispute a defense against a grievance. The idea that the existence of a *prima facie* work assignment dispute is a defense against a grievance is based on the premise that the trade union claiming damages because the work was not performed by its members, would be unable to prove a violation of its collective agreement if the work was properly assigned in the first instance. To raise such a defense is to contemplate that the work assignment dispute will be adjudicated by a competent tribunal. The Board proceeding under section 91(1) of the Act would be such a tribunal, as would the Plan in the instant case, or any tribunal which satisfied the requirements of section 91(14). For example, in the context of this dispute, if application to the Plan were to result in a determination that the Ironworkers had a better claim than the Millwrights to the work at issue in the grievance, a typical remedy would be a direction that the Company continue to assign the work to the Millwrights. In the face of such a direction, the Board sitting as an arbitrator pursuant to section 124 of the Act, is unlikely to make a finding that the Company violated the Millwrights agreement because the work was performed by the Ironworkers. Therefore, if the work assignment dispute is not adjudicated for any reason, the Ironworkers' and the Company's defense would collapse or be substantially undermined and the root cause of the grievance, the work assignment dispute, would be unresolved. That would appear to be why the Board in *Lackie No. 1*, was prepared to make the Millwrights a party to the Ironworkers grievance against Lackie and receive the submissions of all three parties on the proper assignment of the work in dispute. It anticipated that the work assignment dispute between the Ironworkers and the Millwrights might not be adjudicated in some other proceeding under the Act or by some other tribunal and did not want the dispute to be left in limbo.

12. The Board turns now to the second ground for declining to adjudicate the work assignment dispute between the Millwrights and the Ironworkers in this proceeding. They and the Company, along with their respective bargaining agencies, are responsible for the dilemma which now confronts them. This is because of the terms of the collective agreements to which the Company,

the Millwrights and the Ironworkers are bound. Section 91 of the Act gives the Board wide discretionary powers to entertain, determine and remedy work assignment disputes. But, as noted in paragraph 8 above, parties to collective agreements are free to include in their agreements provisions for referring such disputes to a tribunal other than the Board. If all parties to a work assignment dispute are bound by collective agreements which have opted for the same tribunal, section 91(14) of the Act deprives the Board of jurisdiction under section 91(1) to entertain the dispute. The bargaining agencies to the Millwrights agreement and the Ironworkers agreement have bargained and agreed to terms which make the Plan the tribunal for resolving work assignment disputes instead of the Board with all of its powers under section 91. Having done so, section 91(14) of the Act protects that arrangement from incursion by the Board. It clearly proscribes the Board's general jurisdiction under section 91(1) of the Act and it does so without giving the Board any powers to supervise the effectiveness of the process which the parties have selected. Nor does the Act impose any standards or empower the Board to impose any standards on the method adopted by the parties for resolving their work assignment disputes outside of the Act.

13. The dilemma which the parties have created is not new. The Plan in one form or another for many years has been the tribunal selected by building trade unions as an alternative mechanism to section 91 proceedings under the Act for resolving work assignment disputes. Under the Plan as presently formulated, disputes which are not settled by consultation between the disputing trade unions are adjudicated by an arbitrator. For a number of years prior to its present form, the Plan provided for disputes to be adjudicated by the Impartial Jurisdictional Disputes Board ("the IJDB"). Some flavour of that history can be found in the Board's decision in *Dominion Bridge Company Ltd.*, [1982] OLRB Rep. May 667. The Board in that case found that it was deprived of jurisdiction under section 91(1) of the Act by operation of subsection 14 because all parties to the dispute were bound by collective agreements which provided for jurisdiction disputes to be adjudicated by the IJDB. Board members H.J.F. Ade and C. A. Ballentine had the following to say in a concurring opinion to the decision of the Board:

1. We have no choice but to agree with Vice-Chairman Ian Springate as the decision relates to the operation of section 91(14). However, our sympathies are with the applicant union as well as other unions and companies in the construction industry in Ontario, when they endeavour to obtain a just resolve to jurisdictional disputes through the procedure of the "Impartial Jurisdictional Disputes Board" (I.J.D.B.) in accordance with existing collective agreements, such as the case at hand.

2. We want to make it clear that we have no quarrel with the "Procedure Rules" of the "I.J.D.B.". Our concern is one that the "I.J.D.B." and its predecessor the "National Joint Board for the Settlement of Jurisdictional Disputes" has been in a state of flux and disarray for a decade or more.

3. This is not the first time a union has been before the Board with pleas of frustration over what it considers the non-function of the I.J.D.B. The Board dealt with a similar situation in 1979, in *Ontario Hydro*, [1979] OLRB Rep. Feb. 124. That case involved a local union of the same complainant International Union and a sister local of this complainant local union in the instant case, and it involved the same Electrical Power Systems Construction Association (EPSCA) collective agreement.

4. As the Board held in the *Ontario Hydro* case referred to above, where all the parties to the jurisdictional dispute proceeding before the Board are bound by a collective agreement containing an operative provision referred to in section 91(14) of the Act, the Board does not have the jurisdiction to entertain the complaint.

5. If employers and trade unions in the construction industry in this province choose to continue to maintain collective agreements which *require* that they refer jurisdictional disputes to a tribunal which is not functioning in a satisfactory manner, that problem must be resolved by the par-

ties, and not by the Board or the legislature. That is precisely what the majority of the Board told the parties in 1979 *Ontario Hydro* case when it stated:

"In our view, where the parties have mutually selected a tribunal as contemplated in section 81(14) [now 91(14)], they bear the responsibility for ensuring that they have entrusted their disputes to a viable entity. It is not the function of this Board to pass upon the constitution of the Plan and the ability of the IJDB to effectively perform the tasks which have been assigned to it by the parties."

6. The purpose of section 91(14) is, in our view, to permit the parties themselves to fashion a procedure for resolving their jurisdictional disputes internally, without government intervention. This purpose is reinforced by the Act, since it requires the parties to comply with any decision issued by the tribunal selected by the parties. This objective is a laudable one which is consistent with our belief that the parties themselves know what is best for them in developing and maintaining good labour relations.

The parties herein, having created the very circumstances which may frustrate having their work assignment dispute adjudicated by either the Plan, the tribunal which they have selected in their collective agreements, or by the process under section 91 of the Act which was designed for such adjudications, now are asking the Board to accommodate them by adapting a procedure which is intended to deal with disputes between two parties of opposing interests under a collective agreement binding upon them. The adaptation would require making a party to those same proceedings a third party who is a stranger to that agreement and who usually will be allied in interest with one of the parties to the grievance. Bearing in mind that the purpose of section 91(14) of the Act, in the Board's view, is to leave it open to the parties to collective agreements to develop a procedure for resolving jurisdictional disputes amongst themselves without any form of government intervention, the fact that the parties have selected a procedure which they may find unsatisfactory at times, is no reason for the Board to compromise another procedure under the Act in order to alleviate the problem which the parties have created for themselves. They have the power to amend or suspend the arrangements by consent, subject to the normal constraints of the collective bargaining process.

14. That leads the Board to the third ground for declining to use this section 124 proceeding for the purpose of adjudicating the work assignment dispute, and it is that the Board would be unnecessarily and unreasonably encumbering the proceeding with parties who are strangers to the collective agreement under which the arbitration is taking place. The Ironworkers are just that. While there is little doubt that the Board has the discretion to make the Ironworkers a party to this section 124 proceeding, the Board has consistently declined to make a party to a section 124 proceeding any party not having a direct, legal interest in the matter being arbitrated. In this respect, see the Boards decisions in *Napev Construction Ltd.*, [1979] OLRB Rep. Sept. 886 and *Williams Contracting Ltd.*, [1980] OLRB Rep. Jan. 121. Furthermore, in the Board's view, the rules of natural justice would require that the Board serve notice of the proceeding on the parties to the Ironworkers agreement identified in paragraph 2 above. Thus there is potential for as many as three parties who are strangers to the collective agreement under which this proceeding arose being made parties to it. The Board in *Williams, supra*, had this to say at paragraph 12 about allowing strangers to the collective agreement at issue to intervene in section 124 proceedings:

12. We accept the respondent's contention that collective bargaining relationships in the construction industry are interrelated and that employers and trade unions will be interested in, and perhaps affected by, the negotiating or interpretation of collective agreements other than those to which they are immediate parties. However, we do not accept that such "third parties" are entitled, as of right, to intervene in proceedings under section 112a [now section 124], (see: *Napev Construction Ltd.*, [1976] OLRB Rep. Mar. 109; application for judicial review dismissed sub nomine; *Bricklayers, Masons, Independent Union of Canada, Local 1 v. Ontario Labour Relations Board* - decision released May 18, 1977 - unreported) nor do we think the Board

should readily exercise its discretion to add them, simply because they *may* have a commercial interest in the outcome of the proceeding. If strangers to the agreement were entitled to participate, the speed and economy which [section 124] was designed to achieve would be seriously undermined, and the procedure needlessly complicated by the intervention of parties who are neither directly affected, nor bound by the legal result. Of course, nothing prevents an immediate party to a collective agreement from adducing legally admissible evidence of other bargaining relationships where such evidence would be helpful in resolving an ambiguity in the collective agreement in question. Moreover, the existence of an ongoing, quasi-contractual proceeding under [section 124] does not prevent a third party from asserting statutory rights available under other sections (for example, section 81 [now section 91] respecting jurisdictional disputes, section 135 [now section 150] respecting sectoral determinations). In appropriate circumstances the Board may consolidate such proceedings with the [124] proceeding or adjourn the [124] proceeding until more general questions have been resolved. (See, for example: *Napev Construction Ltd.*, Board File No. 0534-79-M, decision released Sept. 17, 1979 - as yet unreported.) In our view these avenues are sufficient to protect third party interests and it is unnecessary to encumber a [section 124] proceeding with numerous interveners in the same interest as the parties already before the Board. There may well be circumstances in which a [section 124] proceeding raises questions of general interest to the industrial relations community and in those cases the Board might well wish to entertain *amicus curiae* submissions; however we are not satisfied that such circumstances exist in the present case. Accordingly, the Board is satisfied that it is unnecessary to adjourn to give notice to other parties and the Registrar is, therefore, directed to relist the matter for a continuation of the hearing on the merits.

While there may be circumstances where the Board would find it justified to encumber a section 124 proceeding with parties who are strangers to the collective agreement under which the grievance was being arbitrated, this referral is not one of them.

15. The fourth and final ground for declining to adjudicate the work assignment dispute in the context of this section 124 proceeding is that, in the Board's view, it is possible for a respondent to a section 124 proceeding to obtain a similar result without encumbering the process by adding parties who are strangers to the collective agreement. As the Board noted in *Williams, supra*, "...nothing prevents an immediate party to a collective agreement from adducing legally admissible evidence of other bargaining relationships where such evidence would be helpful in resolving an ambiguity in the collective agreement in question." It is open to the Company to pursue that option.

16. For all these reasons, the Board will not make the Ironworkers a party to this section 124 proceeding for the purpose of adjudicating either the question of whether the Company was required by the Ironworkers agreement to assign to its members the work in dispute in the grievance, or the question of whether the Ironworkers or the Millwrights had the better claim to the work. In the result, the Registrar is directed to list this referral for hearing on its merits on the earliest available date.

17. This matter is referred to the Registrar

1941-87-M Countryside Farms Limited, Employer v. International Union of Operating Engineers, Local 793, Trade Union

Conciliation - Reference - Whether Minister having authority to appoint a conciliation officer when parties have not yet attempted to bargain - Parties need not meet before the Minister can appoint a conciliation officer

BEFORE: *Robert Herman*, Vice-Chair, and Board Members *W. Gibson* and *E. G. Theobald*.

APPEARANCES: *Roger Marentette* for the employer; *Ms. E. M. Mitchell* and *Mr. Wm. Conlin* for the trade union.

DECISION OF THE BOARD; November 23, 1987

1. Pursuant to section 107 of the *Labour Relations Act*, the Minister has referred to the Board for its opinion a question concerning the authority of the Minister to appoint a conciliation officer.

2. The reference from the Minister reads, in part, as follows:

1. On August 27, 1987, the union requested the appointment of a conciliation officer under section 16 of the *Labour Relations Act*.

2. Following the appointment of a conciliation officer on September 9, the employer objected, by telex and letter dated September 11, and by letters dated September 21 and September 30, to the union's request. Attached hereto and marked as Exhibit "A" are the letters of objection.

3. Briefly stated, the employer takes the position that voluntary recognition was granted on the condition that the employer and union would negotiate a new collective agreement separate from the collective agreement between the Heavy Construction Association of Windsor and the Council of Trade Unions. This agreement to grant voluntary recognition is contained in Minutes of Settlement entered into by the parties on November 1, 1985.

4. The employer also takes the position that the alleged agreement referred to as a "Letter of Understanding", signed on November 19, 1985, by which the employer allegedly agrees to implement the Heavy Construction Association of Windsor collective agreement, which expired on April 30, 1987 and was subsequently renewed, involved a misrepresentation to the employer. The employer states that it did not sign any collective agreement with the trade union other than the Minutes of Settlement by which it agreed to provide voluntary recognition on the above-noted condition.

5. By letters dated September 23 and September 25, the union responded to the objection of the employer. Attached hereto and marked as Exhibit "B" are the letters.

6. Briefly stated, the union takes the position that the Minutes of Settlement reflect the intention of the parties to have the employer treated as a separate employer from another employer, M.B.L. International Contractors. The union states that this intent was finalized with the signing of the Letter of Understanding dated November 19, 1985, by which the employer agreed to a collective agreement incorporating the terms of the Heavy Construction Association of Windsor agreement.

7. Having reviewed the objections to the appointment of a conciliation officer and the trade union's responses thereto, the Minister is of the opinion that a question has been raised as to his authority to appoint an officer in the circumstances of this request. Consequently the Deputy Minister has revoked the appointment of the conciliation officer, pending resolution of this matter.

8. Briefly stated, the question is whether or not the employer has granted voluntary recognition and/or entered into a collective agreement with the employer [sic], thereby entitling the union to request conciliation.

3. At the hearing into this matter, the parties agreed that the employer had voluntarily recognized the union in October, 1985. The parties were in substantial disagreement with respect to whether, consequent to that voluntary recognition, a collective agreement had been entered into between them. Both parties therefore asked the Board to determine whether there had been a binding collective agreement.

4. The request for the appointment of a conciliation officer was made pursuant to section 16 of the Act, which reads as follows:

16.-(1) Where notice has been given under section 14 or 53, the Minister, upon the request of either party, shall appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement.

(2) Notwithstanding the failure of a trade union to give written notice under section 14 or the failure of either party to give written notice under sections 53 and 122, where the parties have met and bargained, the Minister, upon the request of either party, may appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement.

(3) Where an employer and a trade union agree that the employer recognizes the trade union as the exclusive bargaining agent of the employees in a defined bargaining unit and the agreement is in writing signed by the parties, the Minister may, upon the request of either party, appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement.

(4) Notwithstanding anything in this Act, where the Minister has appointed a conciliation officer or a mediator and the parties have failed to enter into a collective agreement within fifteen months from the date of such appointment, the Minister may, upon the joint request of the parties, again appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement, and, upon such appointment being made, sections 17 to 34 and 72 to 79 apply, but such appointment is not a bar to an application for certification or for a declaration that the trade union no longer represents the employees in the bargaining unit.

5. As can be seen, the sub-sections of section 16 apply in different circumstances, and where applicable give the Minister the authority to appoint a conciliation officer. Where an employer has voluntarily recognized a union in an agreement signed in writing by the parties, as has occurred in the instant case, the Minister has the authority to appoint a conciliation officer pursuant to section 16(3). This authority lies whether or not the parties have been able to reach agreement on a first collective agreement.

6. Alternatively, where a collective agreement has been negotiated between the parties, then a party to the agreement can ordinarily give notice to bargain pursuant to section 53 of the Act, in which case the Minister pursuant to section 16(1) of the Act has both the authority to appoint a conciliation officer and the obligation to do so when requested by either party. Even where such notice has not been given, the Minister can appoint pursuant to section 16(2).

7. Therefore it appears to the Board that, whether or not the union has entered into a collective agreement with the employer, the Minister has the requisite authority to appoint a conciliation officer, either pursuant to section 16(3) of the Act, if the parties have never entered a collective agreement, or pursuant to sections 16(1) or (2) of the Act, where the parties have previously entered a collective agreement. In other words, regardless of whether the agreement in question was a valid collective agreement, the Minister has the authority to appoint a conciliation officer.

8. Notwithstanding the provisions of section 16 referred to above, the employer argued

that the Minister has no authority to appoint a conciliation officer until such time as the parties have met pursuant to their obligation under section 15 of the Act. That section reads as follows:

15. The parties shall meet within fifteen days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement.

The employer argued that the evidence would show that the parties have not in fact met, within fifteen days or later, and have not as yet attempted to negotiate a collective agreement between themselves. The employer therefore submitted that as the requirements of section 15 had not been met, the Minister had no authority pursuant to section 16(3) of the Act. There was no dispute that the union has given notice to bargain.

9. We are not persuaded by this submission. Section 16(3) on its face gives the Minister the authority to appoint where there has been voluntary recognition, and does not appear to us to be made subject to any requirement contained in section 15. The employer conceded that no application pursuant to section 89 of the Act, alleging a violation by the union of its obligation under section 15, had been filed. Absent clear language, we are not prepared to read into subsections 16(1) or (2) a requirement that the parties must meet, in fulfilment of their obligations under section 15, before the Minister can otherwise appoint a conciliation officer. The language of subsection 16(2), which specifically requires that the parties have met and bargained, buttresses our view that in the absence of such language (in subsections 16(1) and (3)) the parties are not required to have so met as a condition precedent to the Minister's authority to appoint a conciliation officer. To read in such a requirement would force a union or employer to take a recalcitrant party to the Board, for a declaration pursuant to section 15, before the Minister could appoint a conciliation officer and thereby attempt to facilitate the parties in reaching a collective agreement. Such an interpretation is not consistent with sound labour relations, and as we have said, absent clear language we are not prepared to read such a limitation into the Minister's power pursuant to section 16.

10. Accordingly, and assuming without deciding that the employer is correct that the parties have not yet met face to face to attempt to negotiate a collective agreement, we remain satisfied that the Minister has the authority to appoint a conciliation officer, and it is both unnecessary and inappropriate for the Board to offer an opinion as to whether the parties have previously entered into a valid collective agreement, which by common ground would have in any event expired.

11. The question referred by the Minister was "whether or not the employer has granted voluntary recognition and/or entered into a collective agreement with the employer [sic], thereby entitling the union to request conciliation." In our opinion the employer has granted voluntary recognition or entered into a collective agreement, and whether or not a collective agreement has been entered into, the union is entitled to request a conciliation officer be appointed and the Minister has the requisite authority to so appoint one.

0501-87-U Southern Ontario Newspaper Guild, Local 87 The Newspaper Guild (AFL-CIO-CLC), Complainant v. The Globe and Mail, Division of Canadian Newspapers Company Limited, Respondent

Duty to Bargain in Good Faith - Unfair Labour Practice - Employer refusing to provide, when requested, the salaries being paid to each employee represented by the complainant - Same issue coming up at every negotiating round over the years - Board finding no justification for the notion that individual wage rates are confidential - Union not waiving the right to such information merely because it has bargained with respect to it - Breach of duty

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *J. Murray* and *C. A. Ballentine*.

APPEARANCES: *Stephen Krashinsky*, *Margaret Leighton*, *Paul Pellettier* and *Marian Stinson* for the applicant; *Harvey A. Beresford* and *Diane Barsoski* for the respondent.

DECISION OF G. T. SURDYKOWSKI, VICE-CHAIR, AND BOARD MEMBER C. A. BALLENTINE; November 9, 1987

1. In this complaint under section 89 of the *Labour Relations Act* the Southern Ontario Newspaper Guild, Local 87 The Newspaper Guild (AFL-CIO-CLC), hereinafter the ("Guild") alleged that the Globe and Mail, Division of Canadian Newspapers Company Limited (hereinafter "The Globe") had, in the course of bargaining for a new collective agreement between the parties, breached its obligations under section 15 of the *Labour Relations Act* by refusing to provide, as requested, the salary being paid to each employee in the bargaining units represented by the Guild. The majority of the Board ruled orally on September 24, 1987 (which decision issued in written form on September 28, 1987) that the Globe had breached its obligation, under section 15 of the Act, to bargain in good faith and make every reasonable effort to make a collective agreement by failing to provide the information requested by the Guild and directed the Globe to provide that information. The Board's reasons now follow.

2. The Guild submitted that it had a right to the salary information requested for each bargaining unit employee and that it required this information in order to enable it to properly fulfill its function and duty as the exclusive bargaining agent for those employees. In its evidence and representations the Globe asserted that the information requested by the Guild is confidential in the sense that it is a matter between the individual employee and the Globe, and in the sense that it is important such information be kept from other newspapers because of the competition in the newspaper industry in Toronto. The Globe's primary position, however, was that in the circumstances of the collective bargaining relationship between the parties, namely that they had regularly and consistently bargained the issue, the Guild was not entitled to the information sought. The Globe asserted that to now require it to provide that information to the Guild would be to rend asunder the collective bargaining relationship between the parties and would be unfair to the Globe. The Globe further asserted that the Guild does not really need the information requested because its concerns could be addressed in other ways on the basis of information already available to it.

3. A collective bargaining relationship has existed between the parties for over thirty years. As is common in the newspaper industry, the wage structure of the various collective agreements that have existed between the parties up to June 30, 1987 is one of minimum rates for each classification. For some classifications there is a scale of "minimums" based upon an experience rating. The Globe has been entitled to pay salaries above the minimums stipulated in the various

agreement in recognition of an individual employee's performance. The most recently expired agreements reveal that the Globe has previously agreed to provide the Guild with certain information personal to the employees covered by them. However, the Guild has, over the years, consistently requested and the Globe has consistently refused to provide the individual salaries paid to the employees in the bargaining units. In that regard, we were not satisfied that, on the evidence before the Board, there is any practice of either providing or not providing such information in the newspaper industry in Ontario. Finally, we note that in June, 1985, during the negotiations for the collective agreements that expired on June 30, 1987, the Guild filed a complaint under section 89 of the Act alleging a breach of section 15 with respect to the same issue that is before the Board in this proceeding. That complaint was settled without the Guild obtaining the information but without "prejudice or precedent" to continuing its demands for the information.

4. Section 15 of the *Labour Relations Act* imposes an obligation on the parties to bargain in good faith and make every reasonable effort to make a collective agreement. It has two primary purposes: to reinforce the obligation of the employer to recognize and deal with the trade union as the exclusive bargaining agent of the employees concerned; and, to encourage rational, informed discussion of the real issues between the parties and thereby reduce the potential for avoidable industrial conflict.

5. In proceedings involving section 15, the Board's concern is with the process of collective bargaining. The content of bargaining is relevant only insofar as it sheds light on the process. Section 15 is neither a substitute for bargaining nor a remedy for an imbalance in bargaining power. However, the Board has concluded that the process of collective bargaining that is contemplated by section 15 requires the parties to disclose to each other certain kinds of information relevant to the bargaining process (see, for example, *Canadian Industries Limited*, [1976] OLRB Rep. May 199; *Westinghouse Canada Limited*, [1980] OLRB Rep. April 577; *Sunnycrest Nursing Homes Limited*, [1982] OLRB Rep. Feb. 261; *Consolidated Bathurst Packaging Ltd.*, [1983] OLRB Rep. Sept. 1411; *Royal Conservatory of Music*, [1985] OLRB Rep. Nov. 1652). It is now well settled that a trade union is entitled to the names and wage rates of employees in the bargaining unit for which it must negotiate (see, *DeVilbiss (Canada) Limited*, [1976] OLRB Rep. Mar. 49; *Radio Shack*, [1979] OLRB Rep. Dec. 1220 (judicial review denied) and *Re Tandy Electronics Ltd.*, and *United Steelworkers of America et al.* [1980] 30 O.R. (2d) 29 Ont. Div. Ct., leave to appeal to Ontario Court of Appeal refused March 10, 1980); *Globe Spring and Cushion Co. Ltd.*, [1982] OLRB Rep. Sept. 1303; *North West Merchants Ltd.*, [1983] OLRB Rep. July 1138; *Consolidated Bathurst Packaging Ltd.*, *supra*; *The Windsor Star* (1983), OLRB Rep. Dec. 2147; *The Ontario Cancer Treatment and Research Foundation (Thunder Bay Clinic)*, [1985] OLRB Rep. May 705; *Forintek Canada Corp.* [1986] OLRB Rep. April. 453). Where a trade union is the exclusive bargaining agent for a group of employees, there is no justification for the notion that individual wage rates are confidential between the employees and the employer. As the Board noted in *Forintek Canada Corp.*, *supra* at paragraph 33:

A belief that some number of bargaining unit employees did not wish the requested information disclosed to the union is no answer to a complaint that the failure to disclose it violates section 15 of the Act, any more than a belief that some number of employees did not wish the union to represent them would justify a refusal to bargain with a union which is entitled by law to act as exclusive bargaining agent for a bargaining unit which included those employees. The union's right to and need for the requested information were and are concomitants of the rights and obligations which flow from its status as exclusive bargaining agent, a status which continues until its bargaining rights are abandoned by the trade union or terminated by vote of a majority of employees in the bargaining unit. Although the union has not made a separate complaint about the past survey on which the employer relied during bargaining when it refused to provide requested information, we are bound to observe that it is quite inconsistent with recognition of a trade union as exclusive bargaining agent of all employees in a bargaining unit for the employer

to have asked those employees individually (or collectively) whether they approved of the employer's giving information about their salaries to their bargaining agent. The respondent's demand for individual written authorizations was equally inconsistent with its obligation to recognize the union as exclusive bargaining agent, and neither the union's delay in providing nor its attempts to obtain such authorizations can in any way excuse the respondents' conduct. The fact that Forintek had refused to provide requested particulars of existing terms and conditions of employment during the bargaining which led to previous collective agreements without its refusal then becoming the subject matter of an unfair labour practice complaint is no answer to this complaint that its refusal to do so during these negotiations violated section 15 of the Act.

Nor, in our view, does any employer interest in keeping the wages it pays to its employees a secret outweigh the trade union's interest or right to that information for employees for whom it has the right and obligation to act as bargaining agent. Further, whether or not a trade union actually requires such information in order to fulfill its functions as bargaining agent is not for an employer to decide. *Prima facie*, it is for the trade union, not the employer, to assess for itself what kind and how much information it requires in order to perform its functions. The mere fact that the employer disagrees with that assessment is not sufficient to justify a refusal to provide information that a trade union requests for collective bargaining purposes.

6. Furthermore, the mere fact that the matter had previously been the subject of bargaining between the parties, does not, by itself, in our view, circumscribe a trade union's right to such information. Although such matters can be the subject of bargaining, they cannot be bargained to impasse and made the subject matter of a strike or lockout. Accordingly, a trade union does not waive its right to such information merely because it has bargained with respect to it. To conclude otherwise would unduly interfere in the collective bargaining process, a process which is the most appropriate forum for resolving disagreements between trade unions and employers and one which is best left to the parties. It would also be contrary to the purposes of and policy considerations underlying section 15. Finally, even if bargaining with respect to a matter could by itself amount to a waiver, and in our view it cannot, any such waiver was terminated in this case by the filing and without prejudice settlement of a similar complaint by the Guild in the round of bargaining prior to this one.

7. Accordingly, we made the finding and gave the direction indicated in paragraph 1 herein. In our view, the circumstances were such that no further or other relief was merited or necessary.

DECISION OF BOARD MEMBER J. MURRAY;

As indicated in the Board's oral ruling, subsequently reduced to writing, I originally disagreed with the majority. Upon further reflection however, I find that I agree with the decision and reasons of the majority.

3287-86-R Ontario Public Service Employees Union, Applicant v. Grand River Conservation Authority, Respondent

Bargaining Unit - Certification - Evidence - Officer conducting inquiry into duties and responsibilities of "Area Superintendents" - Union denied opportunity to call evidence on duties and responsibilities of employees engaged as "Interpreters" - Board finding that such evidence not within the scope of the officer's inquiry but arguable whether evidence respecting borderline positions can have any relevance in a determination under section 1(3)(b) - Issue should not be the subject of a hearing until officer's inquiry completed

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *R. W. Pirrie* and *A. HersHKovitz*.

DECISION OF THE BOARD; November 12, 1987

1. This is an application for certification in which the parties are in dispute about whether the first level managerial position should be described as "managers" or "superintendents" in the exclusionary language of the description of the appropriate bargaining unit. The respondent says that all of its "superintendents" exercise managerial functions within the meaning of clause 1(3)(b) of the *Labour Relations Act*. The applicant says that certain superintendents - those referred to hereafter as "area superintendents" - do not fall within the scope of clause 1(3)(b) of the Act. The dispute made no difference to the applicant union's right to certification. In our decision dated March 25, 1987, we granted the union interim certification for a unit which excludes superintendents, pending resolution of this dispute. We also directed that the parties exchange and file statements of material fact and documents relevant to that dispute.

2. As we observed in paragraph 6 of our subsequent decision of July 23, 1987:

6. The material exchanged in accordance with our earlier directions did not result in agreement on all (or even very many) of the facts relevant to the issue whether any or all of the "Superintendents" in dispute exercised managerial functions within the meaning of clause 1(3)(b) of the Act as of the application date. In view of the amount of testimony which may have to be collected with respect to factual issues still in dispute, the parties agree that a Labour Relations Officer should be appointed to inquire into and report to the Board on the duties and responsibilities of the individuals in dispute as of that date, before we determine whether the word "manager" in the unit description in paragraph 2 hereof will be replaced by "Superintendent" in finalizing the description of the appropriate unit in the full-time application. (It should perhaps be noted that that would not necessarily be the result of a finding that some or all "Superintendents" were "managers" on the application date. We would still be bound to ask whether "manager" is not the better word to use in whatever circumstances may be revealed by the evidence.)

In accordance with the agreement referred to in this passage, we appointed a labour relations officer

to inquire into and report to the Board on the duties and responsibilities as of the application date of the following individuals in the positions set out beside their names:

[15 names and positions omitted]

We added that

In the course of the officer's inquiry, neither of the parties shall be permitted to adduce evidence of facts or documents not included or specifically referred to in the materials filed with the Board pursuant to the directions set out in our decision of March 25, 1987, having regard to paragraph 9(6) of that decision.

3. As we understand it, the parties agreed to have the inquiry focus first on 3 persons selected because the parties felt that the Board's opinion about them might be determinative with respect to the others. Subject to the dispute to which reference will be made shortly, the officer's inquiry with respect to the duties and responsibilities of those 3 people is complete. Her report thereon is being prepared, but that preparation is not yet completed.

4. In those circumstances, counsel for the applicant has made the following submissions by letter dated September 24, 1987:

This matter relates to an application for certification in which the outstanding issue is whether or not persons employed as "Area Superintendents" fall within the bargaining unit or are excluded by virtue of S.1(3)(b) of the *Act*.

The Board, by letter dated August 4, 1987 appointed [the Labour Relations Officer] "to inquire into and report to the Board on the duties and responsibilities ..." of the Area Superintendents. At the Officer's hearing the union's request to call evidence on the duties and responsibilities of employees engaged as "Interpreters" was rejected in that they were not Area Superintendents and therefore not within the scope of her appointment. Otherwise [the Officer's] examinations have been completed and her report is pending.

The purpose of this letter is to respectfully request a hearing of the Board to receive representations as to the admissibility of the above evidence as relevant to the Officer's report and to the issue before the Board. As we advised [the Officer] and the Respondent, the union's position may be summarized as follows:

1. The employer's organization is a complex one having two types of operations located outside of the head office:
 - (a) Conservation areas at which the highest ranking employee is the Area Superintendent,
 - (b) Nature centres at which the highest ranking employee is the Interpreter.
2. Interpreters are in the bargaining unit. The staffing at the nature centres bears a marked similarity to the staffing at the conservation areas. Similarly the role played by the Interpreters respecting the hiring, wage level, discipline and discharge of staff is not unlike the role exercised by the Area Superintendent. There has never been any question as to the appropriateness of including Interpreters in the bargaining unit.
3. Management has expressly reserved to itself the right to argue that it requires the exclusion of the highest ranking employee at a location outside of the head office. The evidence respecting the Interpreter serves to place that argument in prospective [sic] and assist the union in its attempt to demonstrate that no legitimate employer interests are jeopardized by including in the unit the highest ranking employee in the conservation areas. In this sense the "Interpreter" evidence relates directly to the duties and responsibilities of the Area Superintendents and how the Board ought to interpret the evidence relating to that category.

It would be appreciated if this matter could be determined following a short hearing so that, if the Board agrees that the evidence is relevant, it can be obtained and placed before the Board along with the balance of the examiner's report.

5. Counsel for the respondent responded to these submissions by letter dated October 15, 1987. He disavows the argument attributed to the respondent in the third numbered paragraph of the above-quoted letter and argues that the evidence sought to be adduced is "irrelevant to the question of whether Area Superintendents exercise managerial functions pursuant [sic] to section 1(3)(b) of the *Act*." He asks that the applicant's request be denied without a hearing.

6. The premise of the applicant's request appears to be that all evidence arguably relevant to the questions which the Board is to address under clause 1(3)(b) must necessarily be within the scope of the inquiry which the officer has been directed to conduct. That is not necessarily so. The officer's inquiry is concerned with the duties and responsibilities actually exercised by the particular persons named. The officer is to collect evidence with respect to what those duties and responsibilities were at the relevant time. The duties and responsibilities of their subordinates and superiors may come into the picture in order to understand what the duties and responsibilities of the disputed individuals actually were. It is not suggested that the Interpreters are either subordinate or superior to the disputed individuals. It is apparent that the evidence which applicant's counsel seeks to introduce is evidence about what the Interpreters' duties and responsibilities actually were at the relevant time, not additional evidence about what the Area Superintendents' duties and responsibilities actually were at that time. Thus, this evidence is not contextual in the same way that evidence of subordinates and superiors might be.

7. Counsel for the respondent challenges the proposition that evidence about the duties and responsibilities associated with other arguably borderline positions can have any relevance in a determination under clause 1(3)(b). We think that is open to argument, and we do not propose to settle that argument without giving counsel an oral hearing. What is not open to argument, however, is whether such evidence was within the scope of the inquiry which the officer was directed to undertake. What counsel for the applicant is really asking, therefore, is that the scope of the officer's inquiry be enlarged so as to include the duties and responsibilities of some or all of the Interpreters.

8. Having regard to the stage of the proceedings at which this request was made, we are of the view that it should not be the subject of a hearing until the officer's report on the 3 individuals examined to date has been completed and circulated.

1295-85-R Retail, Wholesale and Department Store Union AFL-CIO-CLC, Applicant v. **Hamilton Yellow Cab Company Limited**, Fleet Taxi, Yellow Taxi, Transportation Unlimited Inc., D. J. Van Boort, R. Cruden, R. Maurice, J. Lynch, B. Greenland, M. Ferguson, R. Geer, E. Grasley, V. Sudhir, A. Dicasa, P. Dicasa, R. Deacons, R. Botton, F. Mattioli, W. Bray, J. R. McNally, R. Kaur, G. Seliga, W. T. Vanderheyden and Peter Quesnelle, Respondents

Bargaining Unit - Certification - Dependent Contractor - Related Employer - Union seeking to represent a unit of taxicab drivers and "owner-operators" working "under the banner" of the respondent Yellow Cab - Single car/plate owner-operators found to be dependent contractors - No affirmative evidence that owner-operator/dependent contractors wish to be included in the same unit as the helper-drivers - Two units found to be appropriate, one of dependent contractors and one of drivers - Insufficient evidence that other named respondents are related employers - Matter remitted back to labour relations officer

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *I. M. Stamp* and *C. A. Ballentine*.

APPEARANCES: *J. K. A. Hayes*, *Harry Ghadban*, *Brian Lewis* and *William Pring* for the appli-

cant; William G. Charlton, Q.C., David G. Timms and Clayton J. Wallace for the respondents Hamilton Yellow Cab and Transportation Unlimited Inc.; D. J. Van Boort, R. Cruden, and Fred Mattioli on their own behalf.

DECISION OF THE BOARD; November 18, 1987

I

1. This is an application for certification in which the union seeks to represent a unit of taxicab drivers and "owner-operators" working "under the banner" of Hamilton Yellow Cab Company Limited ("Yellow"). The union asserts that for collective bargaining purposes under the *Labour Relations Act*, these drivers and owner-operators are either employees or "dependent contractors" of Yellow - whatever their legal status may be at common law or for other purposes. The union refers to section 1(1)(h) of the Act which reads as follows:

1.-(1) In this Act,

- (h) "dependent contractor" means a person, whether or not employed under a contract of employment, and whether or not furnishing his own tools, vehicles, equipment, machinery, material, or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor;

The union does *not* seek to represent owners of more than one car or taxicab owner's licence ("plate"), or anyone who does not actually drive a vehicle. The union submits that multi-car or multi-plate owners are really small businessmen, not employees or dependent contractors within the meaning of section 1(1)(h) of the Act. The union's proposed unit consists solely of what it describes as "working drivers" who supply their labour to service Yellow's customers, and may, incidentally own or lease a taxi cab licence and/or vehicle. Yellow does not dispute the union's legal characterization of the position of multi-car or multi-plate owners even if some of them may also drive, (and we have neither the evidence nor inclination to do so). Yellow does challenge the union's assertion that the owner operators are "dependent contractors" and that both they and the "pure drivers" are "employees" for collective bargaining purposes. Yellow asserts that the owner-operators are *independent* contractors, and that neither they nor the drivers are "employees" of Yellow.

2. The union further argues that Yellow, Transportation Unlimited Inc. ("Transportation Unlimited") and the other named respondents should all be declared to be "related employers" pursuant to section 1(4) of the Act. That section provides:

- (4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

In the union's submission, the business activities of these respondents are totally integrated with, and substantially controlled by, Yellow. The union argues that, to the extent that those business activities involve employment relationships, these respondents all share with Yellow the role of

“employer” *vis-a-vis* the “working drivers” who actually deliver taxi services to Yellow’s customers.

3. The hearings in this matter consumed a number of days, and the Board heard quite a bit of evidence about the special economic characteristics of the taxi industry. Much of that evidence was not substantially in dispute - although the parties urged us to draw different inferences and legal conclusions from it. We should note that all of the named respondents were given notice of this application and on the first day of hearing quite a number of them appeared either in person or by counsel. Thereafter, however, only Yellow and Transportation Unlimited continued to appear or take an active role in these proceedings. In the result, there was no direct evidence from the other named respondents about their particular business situation or their relationship with either Yellow or the individuals whom the union seeks to represent. Nor did Yellow’s witnesses really address the precise terms of its relationship with the other named respondents. And, because Yellow took the position that even the single car/plate owners/lessees were “independent contractors”, we have little direct evidence about the relationship between these individuals whom the union seeks to represent and those persons said by Yellow to be their “employees” (whom the union also seeks to represent). None of the owner-operators testified about their relationship with their “fill-in” drivers.

4. The Board was advised that the entity formerly known as Wentworth Taxi, no longer exists. Wentworth Taxi is therefore deleted from the style of cause.

II

5. The taxicab industry in the City of Hamilton is closely regulated by City bylaw. Taxicab owners, taxicab drivers, and taxicab “brokers” must all have licences issued by the City. In order to obtain a taxicab driver’s licence, the applicant must have the approval of the taxicab owner, as well as the approval of the taxicab broker at whose place of business the taxicab is located. As a broker, Yellow Cab has co-signed the applications of numerous individuals seeking drivers’ licences. Once licenced, however, a driver is eligible to drive any taxicab in the City of Hamilton. He has no obligation to drive for an approving owner or broker, although obviously he is most likely to drive, at least initially, for his sponsors.

6. The City of Hamilton controls the number of licences or “plates” issued to taxicab owners, and thus the number of cabs on City streets. There are currently 256 outstanding plates. There is an established priority list, and when new licences are to be issued, the City awards them to the applicant(s) at the top of the priority list.

7. A taxicab owner’s licence (plate) may also be purchased from an existing owner at the “going market rate”. We were told that that rate is approximately \$35,000.00. Because the issuance of new plates is relatively infrequent, a person wishing to operate a cab or assemble a “fleet” is more likely to acquire his plate(s) from existing plate owners than from the City; moreover, over the years, some individuals have acquired quite a number of plates, and that gives them a special foothold in the taxi business. For example, the evidence indicates that Albert Di Casa, (the owner of Yellow) his family, his company “Transportation Unlimited” or his business associate Fred Mattioli, own or control a large number of plates, all of which are associated with cabs operating under the Yellow banner.

8. The City bylaw is quite comprehensive in its governance of, *inter alia*, driver appearance, driver conduct, vehicle appearance, mechanical condition, and vehicle use. Before drivers are issued a licence, they are required to establish their knowledge of the City and its bylaw, and demonstrate their medical fitness. Drivers must keep the City apprised of any change of address.

Plates may not be transferred without City approval. Plate owners must maintain insurance. Cars are subject to periodic inspection. Trip records must be kept. Cabs may only be operated if they are in clean condition, good repair, and free from mechanical defects. Licences and photo identification must be prominently displayed. Drivers are required to be neat and clean in appearance and behave in a civil and polite manner. Drivers must not refuse fares, nor make any misleading representation, and when at a public taxi stand, they must not obstruct the use of a sidewalk or make any disturbance. Drivers may only collect one fare when transporting two or more passengers to the same destination. Drivers must immediately report to the owner any accidents, defects in the vehicle or tickets received, and are obliged to turn over to the owner all monies received, less any amount due to the driver as commission. No owner or driver may actively solicit business when parked in any designated public taxistand or other parking area (see generally: Bylaw No. 85-57).

9. The regulations are enforced by licence inspectors and police constables. Yellow has no responsibility for enforcement of these regulations; however, to the extent that they address the quality of customer service, Yellow has an independent interest in maintaining adequate performance standards. Customers contract with Yellow for the provision of particular services (see: *Fraser v. U-Need-A-Car Ltd.* (1985) 50 O.R. (2d) 281 (C.A.)) either by telephoning Yellow or appearing at a Yellow cabstand. In all likelihood, those customers are indifferent as to which "Yellow" owner/operator or driver provides those services, so long as the customers' needs are met in an efficient and courteous manner. In this regard, Yellow applies its own sanctions to ensure that appropriate standards of behaviour and performance are met. We will consider those sanctions and controls in more detail below.

III

10. The delivery of taxi service to the public involves a number of interrelated elements: a car, a plate which permits its use as a taxi, a licenced driver, and a broker/dispatch service which recruits or attracts customers and allocates them to the available cabs. However, the actual matrix of economic relationships can be quite complex. There may be individuals who *own* a car, *own* a plate, and *drive*. There may be individuals who *own* a car, *lease* a plate and *drive*. There may be individuals who *lease* a car, *own* a plate and *drive*. There may be individuals who *lease* both a car and a plate. There may be individuals who own one or more cars or plates but do not drive at all. There may be individuals who own several cars or plates, drive one car, and enter into arrangements permitting other persons to use the other plates or cars. And there are simply *drivers*, who either drive on a full-time basis or may "lease shifts" from other individuals in order to cover weekends, or off-hours, and extend the time that a particular vehicle may be kept in service. The "lease" of a shift involves the right, for a price, to drive someone else's vehicle in the Yellow system, to service Yellow customers. Yellow does not control the details of those economic arrangements except, to some extent, in the case of those plates owned or controlled by Mr. Di Casa, the members of his family, Fred Mattioli his long-time business associate, or Transportation Unlimited, a company in which Mr. Di Casa is the major shareholder and chief executive officer (approximately 58 plates in all).

11. Except as set out below, we have no direct evidence that the multi-car or multi-plate owners (sometimes referred to in the testimony as "fleet owners") have any special relationship with Yellow, Transportation Unlimited or Mr. Di Casa, the principal of these two companies. Nor do we have any direct evidence of their relationship to the owner-operators and drivers whom the union seeks to represent. In particular, we have no direct evidence whether they exercise the kind of control over those owner-operators and drivers with whom they are associated, characteristic of an employer-employee relationship (leaving aside, for now, whether Yellow would, in any event, be a related employer under section 1(4)). Indeed, the proper characterization of the relationships

described above is quite debatable, and not obviously "employment" relationships at all. For example, if A merely leased a car or plate to B, who then drove under the Yellow banner, serving Yellow's customers, in the manner prescribed by Yellow, there would not ordinarily be an "employment" relationship at all as between A and B. Similarly if X "leases a shift" to Y who then works in the service of Yellow's customers under Yellow's direction and control, that would not necessarily make X the "employer" of Y even though X may have a degree of control over Y's opportunity to work in the Yellow system.

12. Unfortunately, because most of the named respondents did not appear or give evidence (despite their obligation to do so under section 1(5) of the Act) we do not know the precise nature of their relationship with the "working drivers" and whether they exercise the right to hire, fire, discipline, control the work, or otherwise act like "an employer" *vis-a-vis* those drivers. Indeed, while we were told that even owner-operators had the power to hire and fire their "fill-in" helpers, we had no direct evidence about that either. We do know that Yellow exercises considerable control over the way in which the taxi services are provided to Yellow's customers, and the economic rewards flowing to the drivers and owner-operators who supply those services. Where necessary, Yellow intervenes to prescribe the service standards which must be met, and to chastise or penalize drivers who do not perform in accordance with Yellow's expectations. Whoever ultimately owns the "tools of the trade" - a car and plate - individuals driving under the Yellow banner are responsible to, controlled by, and under the immediate supervision of Yellow's supervisors. There is no direct evidence that any of the other named respondents or even the owner-operators purport to exercise equivalent or even similar authority over the persons driving their cars for Yellow.

IV

13. Yellow is a taxicab broker with approximately 102 cabs operating under its auspices. Yellow provides the taxicab operators and drivers with access to a computer dispatch service and the use of substations or taxi waiting areas which Yellow has acquired through lease agreements with various Hamilton businesses. Yellow also has established arrangements (for example, with Stelco and Bell Canada) to carry passengers or parcels at pre-established rates. Yellow advertises in the telephone book and elsewhere describing itself as having Hamilton's "largest and finest fleet". Customers are encouraged to call Yellow for prompt and efficient service. They do. Both calls and service complaints are directed to, and dealt with by Yellow. From the customer's perspective, if there is a problem, Yellow is the entity to be notified.

14. Cars operating under the Yellow banner are allocated customers in accordance with a computerized system which logs and directs a customer service request to cars that have booked in to a particular geographic area of the City. Alternatively, cars may book in to various Yellow Cab stands where customers are likely to appear (for example, at the Royal Connaught Hotel) and are picked up on a "first-in, first-out" basis. In both cases customers are acquired because of Yellow, its goodwill in the community, or its business arrangements, rather than the business acumen of a particular driver or owner-operator. At least 80 per cent of all their business (and perhaps more) is generated and allocated through Yellow's computer, because, until very recently, drivers were not permitted to pick up customers "flagging" them on the street.

15. Yellow's charge account customers account for about 30-35 per cent of a driver/owner-operator's daily business. Such customers are provided with a charge slip bearing Yellow's name, and Yellow guarantees payment either in cash or as a deduction from monies payable to Yellow. For other calls, the driver or owner-operator bears the risk of non-payment. While there is no direct evidence on the point, it seems reasonable to infer that non-payment is relatively infrequent.

16. The drivers and owner-operators do not advertise although, we were told, a few of them may have business cards. No such business cards were produced. Nor was it established that they meant very much. It is clear that drivers/owner-operators working under the Yellow banner depend substantially if not exclusively upon Yellow. Even settled runs such as taking a student to and from school on a regular basis were initially obtained through Yellow. While a driver may develop a personal relationship with the customer, Mr. Di Casa, the owner of Yellow, made it clear that he would reallocate the run to another driver if its customer expressed dissatisfaction or if Yellow considered it appropriate to do so. Mr. Di Casa suggested that some of the owner-operators may have private arrangements or customers of which he would be unaware; however, there was no concrete evidence in this regard, and even assuming it to be true, it would make up only a minimal proportion of those individuals' total business - most of which is still derived from Yellow. In the final analysis Yellow substantially determines whom its drivers/owner-operators will serve, and the way in which such service will be delivered; and if a driver/owner-operator does not perform to Yellow's satisfaction he is penalized or dismissed. In the case of a customer complaint, Yellow will deal directly with either the owner-operator or driver directly involved.

17. Yellow Cab's revenues derive from the flat fee of \$235.00 per month per car for the services it provides. Neither taxi drivers nor owner-operators receive "wages" payable by Yellow Cab. Except in the case of Yellow's charge account customers where Yellow pays them directly, their remuneration derives from the fares paid to them by passengers allocated to them by Yellow and carried in the taxicabs that they drive. The various participants (car owner, plate owner, driver, etc.) divide the available funds in accordance with their own privately-struck economic arrangements. The owner-operators and fill-in drivers determine between them which (and how many) shifts the latter will work ("lease"), as well as the revenue split. The owner-operators determine whether to cover their off- hours with one or more drivers. However, while those drivers are on the road, they are subject to Yellow's immediate direction and control in precisely the same way as an owner-operator who drives. (See: *infra* paragraphs 22 and following.)

18. Yellow does not make payments in respect of Unemployment Insurance, Canada Pension, or Workers' Compensation for either owner-operators or drivers, nor does Yellow make any deductions or remissions to Revenue Canada for personal income tax. Each driver/owner-operator, as the case may be, is responsible for the calculation and payment of his own income tax. Drivers/owner-operators do carry receipts with the Yellow Cab logo for the purpose of providing a record of a fare to passengers. Drivers are supposed to keep "trip sheets" recording their fares, and where the trip involves one of Yellow's established business customers, a slip is presented to and signed by the passenger and later presented to Yellow for payment in cash or as a credit against the monthly rental payments. Trip records themselves are not submitted to Yellow.

19. Each plate owner or someone with whom he is associated is responsible for providing a car and all necessary equipment, including a roof sign, taxicab meter, two-way radio and mobile taxi computer. Virtually all of the owners/drivers have either purchased this equipment from Yellow or lease it for a monthly fee. Mr. Di Casa estimated that about 75 cars rent Yellow's equipment and about 25 have purchased it outright. Yellow regulates the size, styling and age of the vehicles it permits to operate under its banner. A notice (part of exhibit 26) specifies that small vehicles such as hatchbacks, vehicles more than five years' old, or vehicles of unusual styling will not ordinarily be permitted and that, if any exception is to be made, the owner must obtain the approval of "management". Similarly, Yellow asserts the right to prohibit advertising signs, bumper stickers, window signs, or interior signs on any car operating in the Yellow system.

20. Yellow's current policy is to "strongly encourage" all drivers to have their cars painted

with the Yellow colours. Cars in the Yellow system have the Yellow logo and telephone number on both doors, and, of course, the distinctive Yellow rooflight. The purpose of such rules, of course, is to ensure that a uniform image is projected to Yellow's customers.

21. Mr. Di Casa testified that Yellow does not know and cannot control the arrangements made between a driver and his helper regarding the working of shifts, the scheduling of vacation time and the replacing of drivers due to illness. Nor, he said, are drivers or operators under any specific obligation imposed by Yellow to work particular shifts or to be available to work on certain days of the week. However, the imperatives of the market and the need to make a living dictate that most owner-operators will be working most of the time, and it is not likely that a car could remain for very long under the Yellow banner if it was regularly unavailable or continually refused to accept service calls from Yellow's customers. Indeed, the refusal to take certain calls results in a penalty (see the discussion of "VIP" calls below). The monthly rental obligations, the distinctive vehicle colours, and the established radio links and computer "tie in" make it totally impractical (if not impossible) for an owner/driver working in the Yellow system to work for anyone else; and, for those drivers or operators working pursuant to a plate actually owned or "managed" by Yellow, there is an additional element of control. The limited amount of business from "flags" also makes it difficult for an owner/driver to operate independently. We were told that, of the 256 outstanding plates on the City of Hamilton, only 13 operate totally independently. All of the rest are associated with brokers such as Yellow. Indeed, there is no direct evidence that any of the drivers or owner operators whom the union seeks to represent either work for some other broker or "freelance", although Mr. Di Casa *speculated* that some *drivers* who work part-time in the Yellow system might also work part-time for somebody else. He was not sure.

22. It was conceded by Mr. Di Casa that Yellow supervisors would be familiar with most of the working drivers and, from time to time, would even be called upon to resolve disputes between them. For those plates which Mr. Di Casa controls, either directly or in association with Mr. Mattioli, the lease provides a right to know the identity of the driver so that one can identify poor insurance risks; moreover, the City bylaw requires a broker to maintain a list of taxicab owners operating under its banner - although we were told that this requirement is not strictly enforced. We are satisfied that Yellow and its supervisors have a fairly accurate picture of the personnel to whom it assigns the task of serving its customers, and if it is dissatisfied, Yellow can ensure the effective removal of the driver from the Yellow organization. Yellow maintains a list of licensed drivers who are not permitted to work for owner-operators in the Yellow system.

23. The nature of the taxi business precludes the kind of direct managerial control which would obtain in an industrial setting. However, the dispatchers and a web of formal rules achieve precisely the same result: conformity with norms prescribed by Yellow and enforced by the imposition of "sanctions" which deprive the owner/driver of his livelihood. Because of Yellow's ability to grant or withhold specific work assignments, and because, while the owner/driver works under the Yellow banner, the opportunity to work flows substantially, if not exclusively, from Yellow, Yellow has a considerable degree of control over the time, place and manner in which the work is performed.

24. A few examples may illustrate the extent of such control.

25. A memo dated November 1, 1985 (exhibit 10) sets out various rules governing the use of the taxistand at the Royal Connaught Hotel, including parking privileges, booking procedure, speed limits, and an injunction to use the containers provided to dispose of trash. Drivers not complying with these rules are first given a warning. A subsequent infraction results in immediate suspension until the driver contacts "management" or his "supervisor" to seek reinstatement. In the

case of "fill-in" drivers this "supervisor" is *not* the owner-operator. It is an employee of Yellow. If the driver under suspension books in to the hotel location he will be immediately "suspended from the Yellow Cab system until notified otherwise by management". The memo further notes that "the onus is on the driver to contact management. The driver is to remain suspended from all future cab work under the Yellow Cab banner until otherwise [sic] the supervisor is notified". Yellow keeps a record of these warnings and suspensions and the supervisors are required to periodically check the computer to ensure that a suspended driver is not booked into the hotel. The memo also notes that "drivers giving supervisors a hassle or otherwise disrupting company business are to be suspended from the Yellow Cab system until further notice".

26. Such detailed prescriptions are not unusual. For example, the arrangement with 7-Eleven Food Stores, a Division of Southland Canada Inc., requires Yellow to indemnify Southland against any liability whatsoever resulting "due to your parking presence on the property" and obligates Yellow to police the parking area. Southland obviously considers the drivers/owner-operators to be part of Yellow's organization for which Yellow is responsible. So, apparently does Yellow. In a letter to Southland dated May 11, 1984, Mr. Di Casa writes:

I was sorry to learn from you that there have been problems with Yellow Cab drivers at your store at Upper Sherman and Concession Streets in Hamilton. I will begin an immediate patrol of the location in order to rectify the situation and comply with the terms of our agreement....I can assure you I will do whatever [sic] required to be certain our drivers do not interfere with store business.

The evidence is that Mr. Di Casa as well as other Yellow managerial personnel or supervisors do indeed monitor the behaviour of drivers/operators at Yellow's various cabstands, and take appropriate action when they are not following Yellow's rules.

27. Exhibits 26 and 27 (further memoranda and instructions to supervisors) reveal a similar pattern. Complaints from Bell Canada concerning a particular driver may result in a suspension for 30 days. There are specific instructions about the tasks to be performed by drivers for particular callers. Drivers who do not "go to voice" (i.e. call in by radio) at the request of a supervisor may be suspended. Drivers whose radio messages are too long may also be suspended. A memo of July 6, 1985, indicates that drivers not rejecting trips upon the instruction of a supervisor are "immediately on a one-week holiday". Drivers falsely reporting "no loads" may be subject to discipline for one week to three months or more, depending upon the frequency of the infractions.

28. A driver who is 15 minutes late responding to a call will be suspended for two hours. A driver who accepts but later rejects a call may also be subject to suspension for one hour. A driver who rejects a Yellow "VIP call" is automatically suspended for one hour unless he is able to persuade a Yellow supervisor that he had a good excuse.

29. A memo in February 1984, indicates that management is prepared to review the past performance of a driver to see whether some additional suspension may be necessary, and as we have already mentioned, Yellow does appear to keep records of such past suspensions. A refusal to leave a substand when required by a supervisor results in a two-day suspension. If problems arise owner-operators/drivers are advised to follow the supervisors' instructions and take the matter up later with management.

30. Until relatively recently, taxi owners could not sell their cabs to someone else who would continue to operate under the Yellow banner without the prior approval of Yellow. For those plates directly owned or controlled by Yellow (those of the Di Casa family, Fred Mattioli and Transportation Unlimited,) the lease arrangement provides that drivers must be approved by Yellow before being permitted to drive. Despite Albert Di Casa's evidence that Yellow would not

necessarily know the drivers working in its system, a memo of June 12, 1985 indicates that owner-operators are required to provide Yellow with a list of drivers. Another memo prescribes that drivers can only be trained during daylight hours and then only if a sign is posted in the cab bearing the Yellow name and apologizing for the inconvenience, or if a Yellow manager or supervisor gives his prior approval. On May 23, 1985 (i.e. about two months after the release of the Court of Appeal's decision in *Fraser v. U-Need-A-Cab Ltd.*, *supra*), Yellow notified its owner-operators and drivers that, henceforth, their cars must be insured at a minimum level of one million dollars lest Yellow be considered responsible for a driver's negligence.

31. As we have already mentioned, Yellow maintains a list of individuals who cannot drive under the Yellow banner, and can effectively terminate its relationship with any owner-operator or driver who does not comply with Yellow's rules. On occasion, Yellow has even required drivers to pass proficiency tests administered by Yellow. A failure to pass such test could result in the driver's termination from the Yellow system. Another memo indicates that Yellow supervisors will assess the drivers' ability, performance and attitudes. A memo of May 1984 suggests that Yellow bears the responsibility for the drivers' appearance (described variously as an "embarrassment" or this "sad state of affairs"), and warns that drivers inappropriately dressed will be sent home.

32. It is unnecessary to multiply the examples. It is evident that Yellow monitors, evaluates and closely regulates the manner in which the drivers/operators work, and when Yellow is dissatisfied with the way in which its customers are being served, Yellow initiates disciplinary or corrective measures which resemble those that would be applied to employees. Such authority is exercised on a regular and quite specific basis. The alleged "independence" of the owner-operators is largely illusory. Like the drivers, they are fully integrated into the Yellow system and subject to its direct control. They are tied to and substantially dependent upon Yellow which permits them, on its own terms (and those prescribed by City By-Law) to service Yellow's customers.

V

33. The respondent Transportation Unlimited is engaged in the taxicab-owner business in the City of Hamilton. Its controlling shareholder and chief executive officer is Albert Di Casa, the controlling shareholder and chief executive officer of Yellow. Transportation Unlimited has the same business address as Yellow.

34. At the date of the application Transportation Unlimited was the owner of 22 plates and the lessee of two others. Eighteen of those 22 plates were in turn leased to taxicab operators on terms which include a weekly rental rate, the control and prior approval of the drivers of the taxicab, the obligation to operate under the Yellow banner, the use of Yellow's standard equipment (radio, computer terminal, etc.) and, we were told, certain responsibilities as to the provision of car insurance which is arranged by Transportation Unlimited. The lease states that the arrangement is not an employer-employee relationship, although, of course, that statement, in itself, does not establish its legal character. Transportation Unlimited, either as owner-lessor or re-lessee of the plates it controls, does not exercise direct responsibility for the engagement, termination or turnover of drivers except to the extent that those drivers are subject to its initial approval and the same on-the-job controls as other drivers in the Yellow system. As we have already noted, all drivers in the system are closely monitored by Yellow's supervisors. Transportation Unlimited makes no payments in respect of Workers' Compensation, Canada Pension, Unemployment Insurance or income tax.

35. Transportation Unlimited operates four cars itself and for this purpose hires nine drivers (for certain shifts for certain cars) whom the parties agree are employees, but whom Mr. Di Casa described as "leasing shifts as our employees." Other individuals also "lease shifts" for a flat

rate depending on the day, and are free to use the car for other than commercial use. Transportation Unlimited arranges insurance and owns the roof sign, taxi meter and radio for all of the cars operating in the Yellow fleet under its auspices either directly or indirectly. Transportation Unlimited pays Yellow a flat monthly brokerage fee in the amount of \$235.00 per month for each of its plates.

VI

36. In conducting its organizing campaign, the union made no distinction between “single car owner-operators” and “drivers”. It typically represents both in other municipalities (although not necessarily in the same bargaining unit) and, in the union’s view, both groups had a community of interest because they were both essentially dependent upon Yellow for their livelihood and subject in their day-to-day work to Yellow’s direction and control. The membership cards signed by new members do not distinguish between drivers and owner-operators.

37. The application for certification was made in respect of a single “mixed” bargaining unit of drivers and single-car owner-operators. Notice of this application was posted in prominent places where it would most likely come to the attention of the drivers and owner-operators potentially affected. No owner-operator intervened in these proceedings to oppose the union’s proposed bargaining unit. On the other hand, neither is there any *positive* evidence that the owner-operators actually *wish* to be included in the same bargaining unit as drivers.

38. Section 6(5) of the Act reads as follows:

(5) A bargaining unit consisting solely of dependent contractors shall be deemed by the Board to be a unit of employees appropriate for collective bargaining but the Board may include dependent contractors in a bargaining unit with other employees if the Board is satisfied that a majority of such dependent contractors wish to be included in such bargaining unit.

VII

39. In 1965 Professor Arthurs introduced the term “dependent contractor” into Ontario’s legal lexicon. He used that term to describe individuals whose economic situation resembles that of an independent entrepreneur in some respects, but, when viewed in its totality, really more closely resembles that of an employee. (See: H. W. Arthurs: *The Dependent Contractor: A Study of the Legal Problems of Countervailing Power* (1965), 16 University of Toronto Law Journal 89). In Professor Arthurs’ opinion, “self-employed truck drivers, peddlers, and taxicab operators, farmers, fishermen and service station lessees personify the dependent contractor”. He argued that these individuals should be entitled to engage in collective bargaining. In 1975 the Legislature accepted that proposition and enacted what is now section 1(1)(h) of the *Labour Relations Act*.

40. In *Adbo Contracting Company Ltd.*, [1977] OLRB Rep. April 197, the Board discussed the background and purpose of the then recent amendment in a long passage to which we might usefully refer:

17. This case requires us to explore the outer limits of the *Labour Relations Act*. The purpose of this statute, as set out in its preamble, is to “further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees”. The Act itself provides a structure for the organization of individual workers into combinations. Collective action by workers, once regarded as amounting to an illegal conspiracy, has been legitimized, the underlying rationale being the need to protect the individual employee from the worst extremes of the labour market. The countervailing power of collective bargaining can now be used by workers to obtain improved wages, hours of work, and other working conditions.

18. The *Labour Relations Act*, however, was never intended to insulate entrepreneurs from economic competition by allowing that class of person to act in combination. Such combinations not only fall outside the purview of collective bargaining legislation, but they are also expressly restricted by the federal *Combines Investigation Act*. Collective bargaining policy, thus, expressly encourages combinations, while competition policy operates in the opposite direction. Given these two quite different policies, it then becomes important to identify the outer limits of our own statute, the *Labour Relations Act*.

19. The task of distinguishing between the individual worker and the true entrepreneur has never been easy. There exists an economic spectrum - coloured at one end by the true entrepreneur and at the other end by the individual worker. These two points of the spectrum can be identified clearly. The businessman who sells goods, and employs others to produce these goods, is clearly not entitled to use the *Labour Relations Act* for the purpose of forming a combination with other businessmen. On the other hand, it is clear that the worker who supplies only his own labour to an employer is entitled to organize with other workers under the Act. At the shaded area toward the middle of the economic spectrum, however, it becomes difficult to draw a distinction.

20. The problem of drawing a distinction in this area is not a new one for this Board. The case of *Livingston Transportation Ltd.*, [1972] OLRB Rep. May 488 provides a good example of the difficulties faced by the Board when determining the outer limits of the Act. The question before the Board was whether certain truck owners were employees or independent contractors. In answering that question, the Board alluded to no less than four approaches that might be taken:

- 1) resort to the control test used for determining the vicarious liability of an employer;
- 2) use of the four-fold test adopted by Lord Wright in *Montreal v. Montreal Locomotive Works Ltd.*, et al [1947] 1 D.L.R. 101, a case concerning liability for municipal taxation;
- 3) simply asking the question of whose business is it;
- 4) application of what was referred to as "the statutory purpose test".

The multiplicity of approaches that emerged in the *Livingston* case is some evidence of the problems that then faced the Board when identifying the outer limits of the Act. Fortunately, there is now a new point of departure for distinguishing between the individual worker and the true entrepreneur.

21. The *Labour Relations Act*, having been amended in 1975, now provides a single, and less confusing, approach to the problem. Section 1 of the Act has been amended to provide that the term "employee" includes a "dependent contractor". That same section defines dependent contractor as "a person, whether or not employed under a contract of employment, and whether or not furnishing his own tools, vehicles, equipment, machinery, material, or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of independent contractor". Section 6 of the Act, moreover, has been amended to provide that "[a] bargaining unit consisting solely of dependent contractors shall be deemed by the Board to be a unit of employees appropriate for collective bargaining but the Board may include dependent contractors in a bargaining unit with other employees if the Board is satisfied that a majority of such dependent contractors wish to be included in such bargaining unit".

22. We do not construe the inclusion of these provisions in the Act as merely amounting to a legislative attempt to codify the Board's existing jurisprudence, such as *Livingston Transportation*. In those cases, the question had to be framed in terms of whether a person was an employee or an independent contractor. The Board, as a result, placed emphasis on the four-fold test as set out in *Montreal Locomotive Works*. The appropriateness of this test for determining the outer limits of a collective bargaining statute was always questionable. This concern

has been best put by Dean Arthurs in his perceptive article, "The Dependent Contractor: A Study of the Legal Problems of Countervailing Power" (1965), U.T.L.J. 89. At page 94, he comments:

Whether the "control" or the "fourfold" test is the more appropriate for identifying the "master-servant" relationship is not here material. The pertinent question is whether the factors in an employment relationship which invoke vicarious liability bear any relation to those which invite a regime of collective bargaining. The very terminology - "master" and "servant" - evokes a nostalgic Victorian image of authoritarianism which is collective bargaining's antithesis. More important, any rationale of vicarious liability focuses ultimately on the allocation of loss as between employer and injured third party, and not on the rights and duties of employers and employees, *inter se*. The control test and its modern successor, the fourfold test, are thus intended to identify those features of the employment relationship which will permit the employer to escape liability if he falls outside the rationale of vicarious liability. Control may be important if vicarious liability is based on a desire to discourage negligent work practices; use of the employer's tools or financial independence upon him may be important if vicarious liability is based on a desire to reach the employer's "deep-pocket," or on a "loss-spreading" rationale. But the relevance of any of these considerations to situations where no third party is present is purely fortuitous. The rationale of labour relations legislation is that the public interest is best served by the promotion of collective bargaining between employers and their employees. Surely any meaningful definition must be formulated in the light of this statutory purpose. Indeed, the Ontario Board in the *Telegram* case recognized this fact: "[T]he elements to be considered are not alone those that were established for the purpose of determining whether an employer is vicariously responsible for the tortious acts of his servants, but those as well that have a bearing on the labour relations aspects of the relationship. ..." Yet the *Montreal Locomotive* test was adopted by the Ontario board in the *Telegram* case, and has been followed ever since.

23. The question that must now be answered by the Board is, not whether a person falling within the shaded area on the economic spectrum is an employee or an independent contractor, but whether that person is a dependent contractor. This new point of departure does not mean that considerations formerly taken into account are now totally irrelevant. The statutory definition of dependent contractor clearly requires some reference to the employee-independent contractor distinction. A shift of emphasis has occurred, however, as this new definition recognizes that persons in an economic position closely analogous to that of the employee should also enjoy the benefits of collective bargaining. The determination of who is a dependent contractor is now a comparative exercise that requires reference to a much broader range of labour relations considerations.

24. This redefinition of the limits of the *Labour Relations Act* serves two purposes. First, it recognizes that, as a matter of fairness, persons in economic positions that are closely analogous should be given the same legislative treatment. A second purpose, and one no less important, is to protect existing collective bargaining rights from being eroded by arrangements that differ only in form, but not in substance, from the employment relationship. These two considerations provide the justification for the shift of emphasis.

25. The shift of emphasis is readily apparent from a reading of the definition of dependent contractor. Clearly a person need not be employed under a contract of employment to be considered as a dependent contractor, and provision of tools, vehicles, equipment, machinery is no longer a major consideration. Contractual form and the ownership of tools are no longer essential considerations. The emphasis, instead, is placed upon economic and business factors. Both the type of economic dependence that exists, and the kind of business relationship entered into, determine whether a person more closely resembles an employee than an independent contractor.

26. Economic dependence must be such that it puts the person in roughly the same economic position as an employee who must face the perils of the labour market. Mere economic vulnerability, however, is not a sufficient basis for a finding that a person is a dependent contractor, since this is a condition that may be experienced by the true entrepreneur, just as much as the

individual worker. There must exist, therefore, a type of economic dependence closely analogous to that of the individual worker.

27. This first requirement of a particular type of economic dependence is closely related to the second requirement of a particular kind of business relationship. In order for a person to be considered a dependent contractor, that person must not only be economically dependent upon another person, but also must be “under an obligation to perform duties for that person” roughly analogous to that of an employee. This reference in the statutory definition requires us to look beyond the factor of economic dependence to the form of the business relationship to determine if it is roughly analogous to that of employer and employee. Such an examination, however, need not result in the identification of a particular contractual obligation, since a business relationship may exist, and continue, in the absence of any particular contractual obligation. The Board, therefore, need not confine itself to this very narrow issue but may deal with the wider issue of the nature of the business relationship.

41. For collective bargaining purposes the Legislature has abandoned the traditional common law distinctions between “employees” and “independent contractors”. Rather, the Act now identifies a hybrid creature - the dependent contractor - whose rights depend upon the statutory definition, labour relations considerations, and the extent to which s/he is in an economic position roughly equivalent to those for whom this collective bargaining statute was designed. The form of the relationship or the possession of particular assets (for example the ownership of *vehicles*) are no longer determinative of an individual’s status. The test is whether the individual or group are more like employees than self-employed independent entrepreneurs. If they are, they are entitled to bargain collectively. It remains a question of just where to draw the line.

42. If the truly “independent contractor” or small entrepreneur is at one end of the economic spectrum, and the employees at the other end, where do the owner-operators and drivers in this case fit - bearing in mind that neither ownership of the vehicle or licence, nor the legal form of the relationship, are controlling factors? In our opinion, the owner-operators are really more like employees of Yellow.

43. What the owner-operators supply to Yellow is primarily their labour, in the service of Yellow’s customers. The fact that they may own or lease a car which, we note, must still meet Yellow’s specifications, does not alter that basic equation. Yellow exercises detailed control over the performance of their work - as it must if it is to preserve its customers’ goodwill, and ensure that they are served in accordance with its own standards. Yellow also maintains an elaborate system of rules and disciplinary responses which effectively penalizes any owner or driver who does not meet those standards. In this regard the owner-operators look very much like employees of Yellow whose position on the job is not that much different from the drivers for Transportation Unlimited, who also work in the Yellow system and whom everyone agrees are employees.

44. Yellow selects the owner-operator whom it will permit to work for its organization, reserves the right to ensure that they are properly trained, monitors their behaviour on the job, and can effectively terminate that relationship at will. Because the City controls the fares (except perhaps in the case of private arrangements between Yellow and its corporate customers) Yellow’s stand rent, fees, and work referrals effectively govern the remuneration of owner-operators to whom work is distributed and paid for on a kind of “piecework” basis. These factors also make the owner-operators look more like employees of Yellow than the independent entrepreneurs that Yellow claims them to be. In a very real sense, the owner-operators “work” for Yellow, not for themselves.

45. The constant references to Yellow’s “management” to whom “on the road” problems are to be referred, is no accident of language. That term quite accurately describes a situation in which Yellow’s supervisors do indeed “manage” the daily activities of the owner-operators and

drivers in the Yellow system. And of course, Yellow is able to do so because there is only a limited degree of skill, expertise, specialization or creativity involved in the work performed by those working drivers. The situation is not analogous to that of an itinerant electrician or plumber whose specialized training and provincial certificate of qualification puts the performance of his work beyond the detailed control of the persons by whom he is engaged from time to time, and who can plausibly claim to be a self-employed small businessman.

46. There is very little evidence of entrepreneurial activity such as self-promotion, advertising, the aggressive solicitation of business from other competitors, price competition or the organization of one's business to take advantage of limited liability or the tax laws. In the case of owner-operators, their so-called "chance of profit" or "risk of loss" (to borrow phrases from *Montreal Locomotive*) has little to do with their business acumen, sensitivity to the market, astute investment, innovation, risk taking, or a perceptive and profitable reading of customer needs or the marketplace. The owner-operator's "business" horizons are almost totally circumscribed by the Yellow organization upon which they are dependent for their work opportunities and revenue flow. It is Yellow's business efforts (and on the evidence they have been quite successful) which generate work for the drivers and owner-operators.

47. If the purchasers of an individual's services are numerous and of diverse character, that is, if s/he sells his/her services to the market generally, the individual looks more like a self-employed small business person than an employee. There is less likely to be the kind of economic dependence or control characteristic of an employment relationship (although even here the situation may be cloudy in the case of part-time workers who move from job to job). In the instant case however, the owner-operators have an established and consistent relationship with only one entity - Yellow - and both the terms of that relationship and the market in which they operate significantly limit their ability to put their skills to the service of others. They could "quit" and go to work for another broker just as any employee could leave Yellow's employ and go to work for another broker but, in reality, there is limited economic mobility or independence. Nor (despite Yellow's assertions to the contrary) are the owner-operators really free to reject job opportunities and work when and where they wish. Not only does economic need preclude such activity, but any personal failure to serve Yellow's customers in the manner and time specified by Yellow would undoubtedly lead to a severance from the Yellow organization. And if one asks the question "whose taxi business is it", the answer is abundantly clear. The owner-operators are not carrying on an independent business on their own behalf rather than on behalf of Yellow. They are an integral part of Yellow's operating organization, subject to Yellow's coordination and control over the "when", "where", and to some extent "how" their labour will be utilized.

48. In all of these respects the owner-operators resemble employees rather than the independent contractors that Yellow claims them to be. In two respects however they do not: their compensation/remuneration does not flow directly from Yellow in the form of "wages" (except perhaps in the case of Yellow's charge-account customers); and, the owner-operators often engage (or "lease shifts" to) other drivers who fill in on off-hours, weekends or holidays when the owner-operator does not want to work.

49. The first factor flows from the special market context of the regulated taxi industry and is probably not particularly significant. However the second factor is more troublesome because, to the extent that an individual profits in any significant sense from the labour of others, he begins to look like an employer who should not be able to take the benefit of the *Labour Relations Act* (see for example *Canada Crushed Stone*, [1977] OLRB Rep. Dec. 806 where the Board held that despite a contractor's economic dependence upon a single purchaser of his services, he was not a "dependent contractor" within the meaning of the Act because he owned a number of trucks and

employed a number of drivers to operate his equipment. His situation, although dependent, did not more closely resemble that of an employee).

50. As we have already mentioned, the taxi business is a highly regulated one in which the standard fares must necessarily be collected, in most instances, by the driver having immediate contact with the customer concerned. There are no "wages" as such. The drivers' income is derived from what is left after the fees payable to others. However, in keeping with the Board's past approach in such matters (see *Blue Line Taxi Co. Limited*, [1979] OLRB Rep. Nov. 1056, *Niagara Veteran Taxi*, [1981] OLRB Rep. Feb. 198, and *Windsor Airline Limousine Services Limited*, [1981] OLRB Rep. March 398) we do not think that is the critical characteristic in the owner-operators/drivers' relationship with Yellow. In *Blue Line* for example the Board observed:

8. It is argued that despite the flow of work opportunities being through the respondent that no compensation or reward flows directly from the respondent to the owner-drivers but rather that all revenues flow from third-party passengers and the owner-drivers are totally at risk for the collection of such; and that this factor distinguishes the instant case from previous cases considered by the Board where the responsibility of revenue collection from third parties was assumed by the respondent and payments flowed directly from the respondent to the owner-driver. In our view this single factor cannot be allowed to obscure the fact that the control of work opportunities by the respondent is of, and in itself, the *sine qua non* of the economic dependence which here exists, and the form of compensating for the service performed is determined by the type of market being served. This form of compensation, combined with the stand rental flowing back to the respondent, must be viewed in the total context of the taxi industry, and is not sufficient to make the driver more closely resemble an independent contractor than an employee.

Similarly in *Niagara Veteran Taxi* the Board commented:

18. Taxi owner-operators are often a triangular relationship with the company they work for and the passengers they service. That the major source of their income happens to be paid to them directly by passengers rather than a taxi company does not itself alter the essential nature of the business relationship between the owner-operator and the taxi company.

19. Another kind of triangular relationship was fully analyzed by the Board in *A. Cupido Haulage Limited*, [1980] OLRB Rep. May 679 where truck owner-operators were in a triangular relationship with a broker, A. Cupido Haulage Limited, and the quarry owners, Canada Crushed Stone. In this situation when owner-operators' compensation was paid by the broker, notwithstanding the fact that they received their compensation from the broker, the Board held that the owner operators were economically dependent on Canada Crushed Stone.

20. The purpose of the dependent contractor amendments to the Act was, generally, to enable persons engage in collective bargaining who, despite numerous earmarks of independent contractors, are in essence dependent for their livelihood on the person or company for whom they perform services for compensation or reward. It would thwart the intention of the Legislature if such persons were denied dependent contractor status just because they receive their compensation directly from the client serviced rather than their employer. This is especially true when neither the scheme of the Act nor the definition of "dependent contractor" stipulates that compensation or reward must come directly from the employer.

We are inclined to accept these views. We do not think that in the context of the taxi industry the collection of fares (set by the City) by owner-operators or drivers is a critical element in their relationship with Yellow - particularly since Yellow retains virtually complete and unreviewable control over the flow of work opportunities and the deductions from the drivers' revenue in respect of stand or equipment rental. If Yellow were to increase these fees, as it could do unilaterally, the operators/drivers would have their income reduced proportionally, and, if dissatisfied, would have little option except to go to work for some other broker - a position analogous to that of a disgruntled employee.

51. The alleged “employment” of others on the other hand is particularly important from a labour relations perspective because this suggests a relationship more closely resembling that of an independent contractor who, in fact is also exhibiting certain attributes of “an employer” - a category that the *Labour Relations Act* quite clearly excludes from the process of collective bargaining (see *Canada Crushed Stone, supra*). However once again, commercial reality does not always correspond neatly with these precise legal categories. In the taxi business, the owner-operator does not engage a replacement driver to “profit from his labour” in any material sense, but rather to fill in for the times when he cannot work for Yellow, so that he can “make ends meet”, and to preserve the continuity of his commitment to the Yellow organization. The owner-operator is an “employer” in form only, for the meaningful lines of accountability still run between Yellow and the working driver, who remains, on the job, subject to Yellow’s rules, direction and control. The economic relationship between the owner-operator and driver is largely confined to agreeing on the split of the revenue derived from serving Yellow’s customers and is either a flat fee or some percentage of the total. Like the owner-operator, the driver derives his income from the name, goodwill, and dispatch service of Yellow, and he is subject to the same rules of behaviour and disciplinary regimen. In this regard the terminology of “leasing a shift” is quite accurate. The driver is not so much being “employed” by the owner-operator, as being permitted, for a fee, to work for Yellow. Yellow can tolerate such substitution because anyone working in its system must conform to Yellow’s detailed prescriptions about the way things must be done, and Yellow always retains the residual right to discipline or terminate any driver that does not meet those norms. In this regard Yellow is not unlike a construction industry employer who will be content with whomever is referred from the union hiring hall so long as s/he conforms to the prescribed standards of performance.

52. The use of a helper or “fill-in worker” to lighten the load of a person alleged to be a dependent contractor has never been considered, by itself, to be an entrepreneurial endeavour which would create a situation more closely resembling an independent contractor than an employee or would preclude involvement in collective bargaining. (See: *Comfort Guard Service Ltd.*, [1978] OLRB Rep. Oct. 905, *Dominion Dairies Limited*, [1978] OLRB Rep. Dec. 1083, *Niagara Veteran Taxi*, [1981] OLRB Rep. Feb. 198, and *Windsor Airline Limousine Services Limited*, [1981] OLRB Rep. March 398.) In *Dominion Dairies Limited* the Board put the problem this way:

The line between contractors whose activities are more closely analogous to those of a wage earner, so as to make them dependent contractors, and contractors who are sufficiently entrepreneurial as to be excluded from that definition is not easy to draw. It can only be drawn in the light of the facts of each particular case. In *Canada Crushed Stone* the Board found that a contractor who owned 10 trucks which were driven by seven employees in an aggregate material hauling business that grossed \$250,000 per year was not, by virtue of the entrepreneurial nature of his business, a dependent contractor within the meaning of the Act. In a more recent decision, *Comfort Guard Services Ltd.* (Board File No. 2007-77-R, as yet unreported, Oct. 6, 1978) the Board found that a heating equipment service contractor was not deprived of status as a dependent contractor merely because he sometimes made use of a helper on his service calls. In that case the Board determined that the use of a helper merely to lighten the serviceman’s load was to be distinguished from the use of an employee hired on a regular basis to drive a second vehicle and make separate service calls, thereby substantially increasing the contractor’s capacity for profit.

When the Board is faced with the question of the effect of the use of paid help by a contractor it must determine whether, in the light of all of the evidence, the person or persons used merely assist the contractor in the performance of his work or in fact perform work that is separate and beyond the work done by the contractor, so that the contractor may fairly be characterized as master of a business that profits in a substantial way from the labour of others.

In this case the Board is satisfied that the contractor-drivers who make use of a single helper, whether occasionally or regularly, do not cease to be dependent contractors by virtue of that

fact. The use of a young helper to lighten the load during the summer season, to shorten the hours worked on a Saturday or to eliminate the burden of stairs on a daily basis does not thrust the contractor-driver into an entrepreneurial undertaking that can be meaningfully described as deriving profit in any substantial way from the work of others. The contractor-drivers examined used helpers when they were employed as milkmen and represented for collective bargaining purposes by the applicant prior to 1970. At that time the Board had recognized that the use of a helper did not of itself deprive an individual on his status as an employee under the Act. (*Automatic Fuels Limited*, [1966] OLRB Rep. Apr. 22).

53. We have very little evidence about the precise relationship between the owner-operators and their fill-in drivers. What we do know is that both are ultimately dependent upon Yellow for their work opportunities and, while working, are subject to Yellow's rules, regulations, and control. The "fill-in" drivers, too, are in a position analogous to drivers employed directly by the Yellow organization, and their relationship can be just as easily terminated. It is inconceivable that a driver could continue to work in the Yellow system once Yellow had indicated that s/he was no longer welcome. Similarly, in the imposition of discipline - be it suspension from the system or otherwise - there is *no evidence* that the owner-operator is invited into the discussion or called upon to apply his own sanctions. So far as can be determined from the evidence before us, Yellow either acts unilaterally or, based upon its own investigation, issues an ultimatum which it expects to be obeyed.

54. Having regard to the totality of the evidence, there is a plausible argument that the owner-operators are "employees" of Yellow despite their ownership of certain tools and equipment; however, having regard to the terms of section 1(1)(h) of the Act, we are persuaded that they can be properly characterized as dependent contractors of Yellow and thus "employees" for statutory purposes who are eligible for collective bargaining. We are also persuaded that the fill-in drivers or helpers are employees of Yellow for collective bargaining purposes - although, as will be seen, that does not mean that the "pure drivers" and owner-operators need necessarily be grouped in the same bargaining unit.

VIII

55. Section 6(5) deems a unit of dependent contractors to be appropriate for collective bargaining but gives the Board a *discretion* to fashion a "mixed unit" where the majority of the dependent contractors indicate their wish to be associated with other employees for collective bargaining purposes, and the collective bargaining contexts suggests that this is a sensible thing to do. Implicit in this formula is the suggestion that dependent contractors may well have a different community of interest from other employees which would warrant grouping them into a separate bargaining unit. Those differences flow from the hybrid character of the dependent contractor as well as the special (and perhaps competitive) relationship with other employees who, as here, may have a degree of dependence on the owner-operator as well as the ultimate "employer" of their services.

56. In the instant case there is no affirmative evidence that the owner-operator/dependent contractors wish to be included in the same bargaining unit as the helper-drivers, and, in our opinion, the structure of section 6 contemplates something more than silence or acquiescence in this regard. "Wishes" are to be canvassed in a positive way - not as suggested here, by the absence of opposition. For example, section 6(1) envisages a representation vote to test employee *wishes* with respect to the bargaining unit configuration. Section 7(2) also refers to employee "wishes" and requires *positive documentary evidence*. Where such evidence is defective or equivocal, the Board will once again seek the confirmatory evidence of a representation vote. These explicit statutory mechanisms suggest to us that the test of employee wishes contemplated by section 6(5) must be satisfied in some positive way - not by silence, negative implication, or non-involvement. It may be

only a line on a union membership card to the effect that: "if I am found to be a dependent contractor, I am content to be included in a bargaining unit with other employees"; but it should be at least as clear as that.

57. Here, we have clear evidence that quite a number of employees and dependent contractors want to be represented by the union and engage in collective bargaining. But there is nothing on the face of the documentary or other evidence before us to suggest that the dependent contractors have even considered the question of bargaining unit configuration or expressed their wish to be included in a mixed bargaining unit with other employees.

58. There is also some evidence that the fill-in drivers may have a different community of collective bargaining interests from the full-time owner-operators. If Yellow ultimately controls the fund of available work opportunities, the owner-operators also have a measure of control over the distribution of those work opportunities which they consider to be surplus. An owner-operator may decide to fill in the open spots in his schedule with one helper or three, and is theoretically free to strike a different bargain with each of them. The drivers remain ultimately responsible to Yellow for their performance on the job, but the owner-operator has a degree of control or influence over their job prospects - not least because if the owner-operator is in some way dissatisfied or chooses to work longer hours, s/he can terminate the relationship forcing the driver to look for work elsewhere. Similarly, (although there is no actual evidence to this effect) an owner-operator may admonish a driver for conduct deemed unacceptable (particularly if Yellow expressed that opinion) and could conceivably sever his relationship with a driver for that reason. Finally, the evidence does suggest that owner-operators may provide on-the-job training for new drivers (subject to rules established by Yellow) which may involve some measure of performance assessment.

59. In summary then, we really do not have concrete evidence that the owner-operators wish to be included in a mixed bargaining unit with helper-drivers and there is some indication that those drivers may have a different community of interest which would warrant their inclusion in their own bargaining unit. We should also note that just as there is no evidence that the owner-operators wish to be grouped together with drivers, neither is there any evidence that the drivers wish to be grouped together with the owner-operators with whom they have an economic relationship.

60. In all of the circumstances and given the state of the evidence, we are persuaded that the most prudent course is to designate two bargaining units: one of single car/plate owner-operator dependent contractors whom the statute deems to be an appropriate bargaining unit, and a second unit of other drivers who work within the Yellow system.

IX

61. The final question which we must address concerns the position of the "fleet owners" and other respondents whom the union contends are "related employers" within the meaning of section 1(4) of the Act. The union contends that in order to establish a sensible and realistic collective bargaining framework, these respondents should be assigned to the employer side of the equation and grouped together as "related employers" with Yellow and Transportation Unlimited.

62. Section 1(4) of the Act was enacted in 1971 and deals with situations where the economic activity giving rise to employment or collective bargaining relationships regulated by the Act, is carried out by, or through, more than one legal entity. Where such legal entities carry on related business activities under common control or direction, the Board is empowered to pierce the corporate veil and, for collective bargaining purposes, group together those entities which control or influence employer-employee relationships. Section 1(4) ensures that the institutional rights

of a trade union and the contractual rights of its members, will attach to a definable commercial activity, rather than the legal vehicles through which that activity is carried on. Legal form is not permitted to dictate or fragment a collective-bargaining structure; nor will alterations in legal form undermine established bargaining rights. In *J. H. Normick Inc.*, [1979] OLRB Rep. Dec. 1176 the Board described the effect of section 1(4) in these terms:

21. Section 1(4) recognizes that the business activities which give rise to the employer-employee relationships regulated by the Act, can be carried on through a variety of legal vehicles or arrangements; and it may not make "industrial relations sense" to allow the form of such arrangements to dictate, and possibly fragment, the collective bargaining structure. In order to have orderly and stable collective bargaining, the bargaining structure must have some permanence and accord with underlying economic and industrial relations realities. Where two employers are nominally independent but are functionally and economically integrated, the essential community of interest between them and the employees employed by one or both of them may make it appropriate to treat them as one employer for some or all collective bargaining purposes. This is not to say, however, that common economic control or related business activities will automatically cause the Board to issue a section 1(4) declaration. The Board, having satisfied itself that the businesses or activities before it are under common control or direction, is given a discretion as to whether or not to issue a section 1(4) declaration. If the scheme of the Act would be better served or the collective bargaining structures placed on a sounder footing by refusing to make a section 1(4) declaration the Board will exercise its discretion accordingly. (See *Zaph Construction Ltd.*, [1976] OLRB Rep. Nov. 741 and *Ellwall and Sons Construction Limited*, [1978] OLRB Rep. June 535.) In view of the broad language of the section which extends to cover such a wide range of business relationships, the labour relations considerations which govern the exercise of the Board's discretion are paramount in determining whether the Board should declare two or more businesses or activities to be one employer for purposes of *The Labour Relations Act*.

In *Brantwood Manor*, [1986] OLRB Rep. Jan. 9, the Board added these observations:

101. When the application of subsection 1(4) is in issue, the Board is concerned with the definition or potential redefinition of a continuing collective bargaining relationship, not with the assignment of vicarious liability for an occasion of negligence, nor solely with the interpretation and application of the language of a collective agreement. If there is a serious debate over which of two entities is the employer of persons who are conceded to be someone's employees, that will be because some of the important attributes of an employer can be seen in each of them. When each of the entities appear to have a real stake in and influence on matters of relevance to the labour relations of employees in a bargaining unit, then even from their perspective it may make sense to treat them both as the employer for labour relations purposes than to choose between them and designate one as employer for labour relations purposes to the exclusion of the other, who might for other purposes be treated as employer. The possibility that a choice is unnecessary or inappropriate should be considered before the choice is made.

102. It is important to observe that, in determining whether to declare that two distinct legal entities constitute one employer for the purposes of the *Labour Relations Act*, the question whether the discretion to do so exists in the circumstances at hand and the question whether such a declaration ought to be made in those circumstances are two distinct questions. Accordingly, it is not particularly helpful to test the reasonableness of a proposed interpretation of the phrases "associated or related activities or businesses" and "common control or direction" by asking whether that interpretation could embrace circumstances in which a declaration ought not to be made. In giving the Board a discretion whether to make or not make a declaration when the preconditions it specified had been made out, the Legislature recognized that there could well be circumstances in which "associated or related activities or businesses" are carried on by two entities "under common control or direction" without there being any valid labour relations reason for treating the two entities as constituting one employer for the purposes of the Act. Thus, we can accept the proposition that the degree and nature of the control and direction which a standard form construction contract permits a contractor to exercise on a construction project over an otherwise independent subcontractor would not ordinarily warrant making a declaration that the contractor and subcontractor are one employer for the purposes of the *Labour Relations Act*, without having to accept also the argument that the parties to such a rel-

ationship are not "under common direction or control" as those words are used in subsection 1(4). Apart altogether from the fact that the contracts with which we are concerned here contain provisions which are not found in standard construction contracts and which do play a significant part in our analysis, the suggested analogy with the usual contractual hierarchy on a "typical" construction project is inapt, if only because it does not take into account the collective bargaining relationships which typically co-exist with that contractual hierarchy and which typically make it either unnecessary or inappropriate from a labour relations perspective to treat contractors and their subcontractors as one employer for the purposes of the Act.

63. The problem in the instant case arises not from these general propositions, which we accept, but rather from the ambiguity of their application in the circumstances before us. For reasons that we have already discussed, the evidence indicates that Yellow exercises substantial - indeed overriding - control over the way in which the individuals whom the union seeks to represent go about their daily routine. We can readily conclude that Yellow and Transportation Unlimited should be treated as "one employer" for collective bargaining purposes, and we so declare. There is virtually no evidence with respect to the other named respondents and no reason to believe that their inclusion in a related employer declaration would make much difference. It is tempting to accept the union's submission that collective bargaining matters would be simplified if all of the business entities potentially associated with Yellow and having some economic relationship or degree of influence over the group whom the union seeks to represent were treated as "one employer" for collective bargaining purposes. However, the evidence before us simply does not warrant that exercise of our discretion even if, from both a commercial and linguistic perspective, Yellow, Transportation Unlimited, and the other named respondents are engaged in related business activities under the common control, direction and coordination of Yellow and its principals.

64. We conclude, therefore, that Yellow and Transportation Unlimited should be, and are hereby declared to be "one employer" for the purposes of the *Labour Relations Act*, but that the section 1(4) application in respect of the other named respondents should be dismissed - without prejudice to the union's right to bring such further application as the circumstances may warrant.

65. For the foregoing reasons, we conclude:

1. That the single car/plate owner-operators are dependent contractors of Yellow and therefore entitled to engage in collective bargaining.
2. That on the evidence before us there should be two bargaining units: one consisting of dependent contractors and another consisting of drivers.
3. That the union's plea to "tie in" the other named respondents as "related employers" must be dismissed for lack of evidence or proof of collective bargaining necessity - but without prejudice to a further application should such appear to be warranted.

66. With these determinations and general observations, the Board hereby remits this matter back to the Labour Relations Officer, already appointed, for the purpose of sorting out any remaining questions concerning the employee lists or the composition of the bargaining units. The Board (but not necessarily this panel) will remain seized of any outstanding issues and will entertain such further representations as any of the parties may wish to make.

1260-87-R United Steelworkers of America, Applicant v. Herbie's Drug Warehouse Limited, Respondent v. Group of Employees, Objectors

Bargaining Unit - Certification - Representation Vote - Voter eligibility language interpreted - Whether employee promoted out of bargaining unit between date vote ordered and vote held - Officer ordered to inquire into duties and responsibilities of person in dispute as of vote date

BEFORE: *Patricia Hughes*, Vice-Chair, and Board Members *D. A. MacDonald* and *C. A. Ballentine*.

DECISION OF THE BOARD; November 10, 1987

1. In this application for certification, the Board, by decision dated September 4, 1987, appointed a Labour Relations Officer to inquire into and report back to the Board on the duties and responsibilities of a disputed employee, Vicki Campsall, under section 1(3)(b) of the *Labour Relations Act* ("the Act"). The respondent sought the exclusion of Vicki Campsall on the ground that, as "head cashier", she exercised managerial functions; the applicant took the position she did not exercise managerial functions and therefore she should have been included in the unit. (The parties had agreed that Loraine Ball, also classified as "head cashier", should be excluded from the unit under section 1(3)(b) of the Act.)

2. The Board also directed that votes be held for bargaining unit #1 (full-time unit) and bargaining unit #2 (part-time unit), reflecting the agreement of the parties. On the taking of the vote, more than fifty per cent of the ballots cast by employees in each bargaining unit were cast in favour of the applicant. In the case of bargaining unit #1, there was one segregated ballot which could change the outcome of the vote.

3. There were no segregated ballots cast by employees in bargaining unit #2. Accordingly, a certificate shall issue to the applicant with respect to bargaining unit #2.

4. The segregated ballot cast in bargaining unit #1 was not cast by Vicki Campsall who had left the employ of the respondent by the time of the vote. The segregated ballot was cast by Kim Malette whose name was on the voters list, but whose right to vote had been challenged by the union when she attended to vote. Accordingly, she was allowed to vote and her ballot segregated.

5. In a letter dated September 15, 1987, counsel to the union informed the Board that the union "concurs with the position of the respondent that the function of head cashier is properly excluded from the bargaining unit" and that, since in its view Kim Malette replaced Vicki Campsall as head cashier, she should be excluded from the unit and her ballot not counted. This would result in the union's certification for the full-time unit. The employer's counsel, in a letter dated September 16, 1987, states that Kim Malette was appointed as assistant to the head cashier and that there is only one head cashier, presumably Loraine Ball. Thus the employer contends that Ms. Malette be included in the unit and her ballot be counted. If Ms. Malette's ballot were counted, her voting preference would be revealed; accordingly, should she be found to be included in the unit, the Board would order another vote: *SGS Supervision Services Inc.*, [1981] OLRB Rep. Oct. 1471. The respondent and applicant thus take positions with respect to Ms. Malette in opposition to those they took with respect to Ms. Campsall. The objecting employees' representative also takes the position that Ms. Malette's vote should be counted since he contends she is not management: he states she reports to the head cashier Loraine Ball and is paid an hourly rate rather than the salaried rate paid Ms. Ball. The parties acknowledged that a new vote was a possibility in the

Consent and Waiver form which they signed when the vote was taken and counted on September 11, 1987. Ms. Malette herself has requested (in a letter received October 5, 1987) that her ballot be counted. She states that she merely did "the paper work" when Vicki Campsall left and that she exercised no "management authority (hiring firing)".

6. In its September 4, 1987 decision, the Board noted that the parties had agreed that "the voters list shall be fixed as of August 28, 1987". If the parties were held to that agreement and the list were determinative, Ms. Malette would be included in the unit since she was included on the voters list. Here, however, the union's contention is that she assumed a managerial position between August 28, 1987 and the date the vote was taken. The union contends that, although it took the view that Vicki Campsall did not exercise managerial functions, Kim Malette, who it says has replaced Ms. Campsall, does. The respondent continues to maintain Ms. Malette should be included, consistent with her presence on the agreed-to voters list, because she has not replaced Vicki Campsall. Both parties agree that the position of head cashier is excluded. The question, therefore, is whether Kim Malette was performing the duties of a head cashier at the operative time.

7. Paragraph 12 of the September 4 decision contained the following standard clause:

All employees in each bargaining unit who do not voluntarily terminate their employment or who are not discharged for cause between [September 4, 1987] and [September 11, 1987] will be eligible to vote. ("the eligibility clause")

Ms. Malette's name was on the voters list as an employee in the bargaining unit; she neither voluntarily terminated her employment nor was she discharged for cause. She *may* have been "promoted", however, and as such would be excluded from the unit by operation of section 1(3)(b) of the Act. It is, of course, fundamental to the scheme of labour relations codified by the Act that employees and employer, as represented by management, maintain an arm's length relationship. We observe that the union's understanding is that Ms. Malette had assumed her managerial duties before the Board directed the vote but, presumably, after August 28, 1987. In that case, she would not be an employee on either of the days referred to in the eligibility clause. Even if she assumed them at a later date, on the union's account of events, she would not have been an employee on both dates in the eligibility clause, as she would have to be in order to be included in the unit. The phrases in the eligibility clause have been interpreted such that persons who assume managerial functions between the date the Board directs the vote and the date the vote is taken will not be eligible to vote even though they were on the voters list and did not exercise those functions on the date of application: see *Canadian Westinghouse Company Limited*, [1966] OLRB Rep. Sept. 372 in which the Board explained at paragraph 6:

6. The Board's standard direction for the taking of a representation vote, as quoted above, cites only two instances in which a person who was an employee in the bargaining unit on the date the vote was directed forfeits his eligibility to vote, namely, where he voluntarily terminates his employment or is discharged for cause before the date the vote is taken. The Board, however, has not attempted in its standard direction to define exhaustively all of the contingencies under which a person who was an employee in the bargaining unit when the vote was directed would cease to be eligible to vote. The Board has consistently interpreted its direction to mean that a person who, between the date of the direction and the date of the vote, has ceased to be a member of the bargaining unit, is disqualified from participating in the vote, whether because of voluntary termination of employment, discharge for cause, indefinite lay-off in some circumstances, or transfer to a position out of the bargaining unit. Stated another way, the policy of the Board is that a person must be an employee in the bargaining unit both on the date the vote is directed and on the date of the taking of the vote in order to be eligible to cast a ballot.

In that case, an individual whose right to vote was challenged at the taking of the vote, was an

employee in the bargaining unit on the date the vote was directed but was subsequently promoted to assistant foreman. The Board ruled that since he was not an employee in the unit at the time the vote was taken, he was not eligible to vote. (Also see *The Regional Municipality of Durham*, [1980] OLRB Rep. Jan. 90.)

8. In this instance, the policy underlying the statutory deeming of managers not to be employees requires that Ms. Malette be excluded from the unit if she has in fact assumed the position of head cashier.

9. Accordingly, the appointment of the Officer in the September 4, 1987 decision is amended to repeal the direction to inquire into the duties and responsibilities of Vicki Campsall; instead, the Officer is to inquire into and report back to the Board on the duties and responsibilities of Kim Malette under section 1(3)(b) of the Act on the date the vote was taken, September 11, 1987. It will be of assistance to the Board to have evidence before it not only with respect to the new duties and responsibilities of Ms. Malette, but also what the duties and responsibilities of head cashier are.

10. This matter is referred to the Registrar.

1243-87-R United Food and Commercial Workers International Union Local 633, Applicant v. H. W. Gluck Limited (carrying on business as Keswick I.G.A.), Respondent v. Group of Employees, Objectors

Bargaining Unit - Certification - Whether meat department in a retail food store an appropriate unit - Applicant having an established history of representing meat department employees - Unit deemed by section 6(3) to be appropriate as a craft unit - Deli employees to be included in unit - Certificate issuing

BEFORE: *N. B. Satterfield*, Vice Chair, and Board Members *W. H. Wightman* and *J. Sarra*.

DECISION OF THE BOARD; November 2, 1987

1. The Board issued a decision in this application for certification on September 2, 1987, finding a unit of the respondent's employees described as follows to be a unit of employees appropriate for collective bargaining:

All meat department employees of the respondent in Keswick, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.

The Board was unable to proceed further at the time because the parties were in dispute about whether full-time employees in the deli section of the respondent's store should be included in the unit. Subsequently, on October 26, 1987, the Board issued a further decision certifying the applicant as exclusive bargaining agent for the employees in the unit and declared full-time deli section employees to be included in it. The Board's reasons for its decisions are set out herein.

2. When the parties came before the Board, they were agreed that the unit should be described either as set out above or in terms which would include all full-time employees of the respondent in Keswick, but they were not agreed on which unit was appropriate. The unit described above is the one which the applicant was seeking, whereas the respondent contended that the appropriate unit was one comprised of all full-time employees, including the meat department employees. Accordingly, the Board heard their representations on that issue.

3. Respondent counsel informed the Board that the respondent operates a supermarket in Keswick, Ontario, comprised of six or seven departments in addition to its meat department. Some of these departments are: deli, produce, groceries, dairy and bakery. The heads of each department in the store report to Mr. H. W. Gluck, the owner of the store, or in his absence, to Betty Rowland, his assistant. The wages of all employees are centrally administered, employees have the same options with respect to employee benefits and they are subject to the same working conditions. When employees have problems respecting their working conditions, they take the problems to Gluck or Rowland for resolution.

4. Respondent counsel contends that, were the Board to allow the applicant to carve out a small unit of meat department employees from such an interdependent, cohesive and integrated group of employees, it would do violence to the Board's policy of avoiding undue fragmentation of bargaining units. Should the applicant be certified for a unit of full-time meat department employees, it would mean that only a few of the store employees would be unionized, with the result that they would be segregated from the remainder and the majority of the store employees. That circumstance, it is argued, would impact adversely on the setting of rates of pay and benefits as between the meat department employees and employees of other departments. If other employees eventually became unionized, the presence of several bargaining units and separate bargaining would increase the likelihood of strikes with the attendant impact on the public who patronize the stores.

5. While respondent counsel acknowledges that the applicant has a history of bargaining for meat department employees in supermarkets, he submits that the applicant's history should not be the sole determining factor for deciding the issue of the appropriate unit. Counsel argues that the Board has an obligation under section 6 of the Act to consider in each case what unit of employees is appropriate for collective bargaining on the facts before the Board, and to do so in accordance with its own policies and guidelines, particularly the policy of avoiding undue fragmentation, set out in such Board decisions as *Harlequin Enterprises Limited*, [1987] OLRB Rep. Feb. 226, *Bestview Holdings Limited*, [1983] OLRB Rep. Aug. 1250 and *The Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266. Counsel submits that those policies and guidelines applied to the circumstances of the respondent's retail food store operation, particularly to the community of interest shared between employees of the various store departments, would establish a unit of all full-time employees as the appropriate unit. Counsel also relied on the Board's decision in *Dollo Bros. Foodmarket Ltd.*, [1986] OLRB Rep. Jan. 82 as an example of the Board having found the meat department of a retail food store not to be an appropriate unit.

6. The United Food and Commercial Workers International Union Local 633 ("Local 633"), as long as twenty-five years ago when it was known as Local 633 of the Amalgamated Meat Cutters and Butcher Workmen of North America, had an established history before this Board of representing employees in meat departments of retail food stores. See the Board's decision in *London Food City* [1962] OLRB Rep. Aug. 151. The continuity of that history was recognized by the Board in its decision in *Huntsville IGA*, [1982] OLRB Rep. Nov. 1637, when the Board certified Local 633 for a unit of all full-time meat department employees of Huntsville IGA on the

strength of its history of representing full-time meat department employees in retail food stores. At paragraph 7, before making its finding, the Board said:

It is readily apparent to the Board that Local 633 of the United Food and Commercial Workers International Union has a consistent and uninterrupted history of bargaining for full-time meat department employees and that Local 175 of the same union has a consistent and uninterrupted history of bargaining for the other employees, that is, full-time non-meat department employees, part-time employees including part-time meat department employees and students employed during the school vacation period.

The significance of that history was recognized by the Board in its decision in *Dollo Bros.*, *supra*, on which the respondent herein has relied to show that the Board will not always find a unit of full-time meat department employees to be appropriate for collective bargaining. The applicant in that case was the United Food and Commercial Workers International Union ("UFCW"), the international union which holds Local 633's charter. The UFCW had applied for a unit of all of the employer's full-time employees. The employer took the position that the meat department employees should be in a separate unit. At paragraph 6 the Board said:

Meat department employees may form an appropriate bargaining unit when the conditions set forth in section 6(3) of the Act are satisfied. *From time to time a local trade union of a trade union which was a predecessor of the applicant has applied for and been granted appropriate bargaining units of meat department employees. On the other hand, another local trade union which was also a predecessor of the applicant has been granted appropriate units of all employees in a retail store or stores, including meat department employees.* For a general discussion of this history see *Ontario Food Division (Food City) of the Oshawa Group Limited*, [1978] OLRB Rep. Sept. 826 and *Huntsville IGA*, [1982] OLRB Rep. Nov. 1637. The provisions of section 6(3) provide that under the conditions set forth therein craft bargaining units are deemed to be appropriate for collective bargaining. The provisions of section 6(3) cut across the boundaries of community of interest with other groups of employees where the conditions set forth in section 6(3) are shown to exist. However, the converse that craft units are always appropriate bargaining units for collective bargaining is not true. The applicant clearly has an option on how to frame its application. The applicant has chosen to seek certification in terms of one bargaining unit.

[emphasis added]

The reference to "...a local trade union of a trade union which was a predecessor of the applicant..." is clearly a reference to Local 633. The reference to "..., another local trade union which was also a predecessor of the applicant..." is a reference to Local 175 of the UFCW referred to in *Huntsville IGA*, *supra*.

7. The representations of counsel for Local 633 are that, in retail food stores where both locals have bargaining rights, Local 175 represents employees other than full-time meat department employees. Those bargaining rights could be in respect of a unit of all employees of a retail food store, excluding full-time meat department employees, or a separate unit of all full-time employees, excluding full-time meat department employees and/or a separate unit of all part-time employees and students. Those representations find support in the Board's decisions. In this respect see *Huntsville IGA*, *supra*, and the decisions referred to therein at paragraph 6.

8. It may be seen from the Board's findings in the *Huntsville IGA* and *Dollo Bros.* decisions that, when Local 633 applies for a unit of all full-time meat department employees in a retail food store, the Board has found such a unit to be one which is appropriate for collective bargaining within the meaning of Section 6(3) of the Act, even though the unit is not described in typical craft union terms. In other words, the Board has found full-time meat department employees in a retail food store, when represented by Local 633, to be a group of employees who are distinguishable

from other employees because they exercise technical skills or are members of a craft and, in the words of section 6(3), "...commonly bargain separately and apart from other employees through a trade union that according to established trade union practice pertains to such skills or crafts...". Where the Board finds those conditions, it is mandated by section 6(3) of the Act to deem the group of employees to be a unit appropriate for collective bargaining and, as the Board stated in *Dollo Bros.*, *supra*, those provisions "... cut across the boundaries of community of interest with other groups of employees...".

9. In the instant application, the bargaining unit sought by Local 633 is the same unit which, on the history of the cases above referred, the Board previously has found to satisfy the conditions of section 6(3) of the Act when the employees are represented by Local 633. The unit is one deemed by section 6(3) to be appropriate for collective bargaining. It was in these circumstances and for these reasons that the Board made its finding in paragraph 5 of its September 2, 1987, decision that a unit comprised of the respondents full-time meat department employees was a unit appropriate for collective bargaining.

10. The parties were also in dispute about whether the meat department unit included employees of the deli section of the respondent's store. Local 633 took the position that it did and the respondent took the contrary position. The issue was unresolved when the Board adjourned the hearing and a Board officer had been authorized to inquire into and report to the Board on certain matters relating to the issue. In the interim, Local 175 has applied for certification respecting other employees of the store. There was an issue in that application whether employees of the deli section were to be included in the unit which that applicant was seeking. The Board has been advised by the solicitors for the respondent herein that the respondent was withdrawing its objection to full-time deli section employees being included in the meat department unit.

11. Having regard to the agreement of the parties and to all of the foregoing, for purposes of clarity, the Board declares that deli section employees regularly employed for twenty-four (24) hours per week are included in the bargaining unit described at paragraph 1 of this decision.

12. Having further regard to the agreement of the parties, the Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on August 18, 1987, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

13. Three statements in opposition to the application were filed with the Board. Two of them, each bearing a single signature, were not filed within the time fixed in accordance with the *Labour Relations Act* and the Rules of Procedure under the Act. The third petition contained the signatures of two persons who were not employees in the bargaining unit described above. In these circumstances, the Board has given no weight to the three petitions in assessing the true wishes of the employees in the bargaining unit.

14. It was for these reasons and in these circumstances that the Board issued a certificate to the applicant.

2051-87-M International Union of Operating Engineers, Local 793, Applicant v. Ledcore Industries Limited, Respondent

Right of Access - Dispute over terms of the access direction - Whether access to bunk house should be limited - Whether hours of access should be restricted - Access order to expire on terminal date fixed in any future certification application

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *R. M. Sloan* and *B. L. Armstrong*.

APPEARANCES: *Murray Gold* and *Pat Maley* for the applicant; *Robert Statton*, *Geoff Akehurst* and *Ron Stevenson* for the respondent.

DECISION OF THE BOARD (delivered orally November 20, 1987); November 24, 1987

1. This is an application under section 11 of the *Labour Relations Act* for a direction giving the applicant access to property described in the application as “(M.T.C. Contract 87 - 452) Bending Lake Road from 19.6 kilometres south of Highway 17, southerly for 11.3 kilometres, District of Kenora.” Section 11 of the Act provides:

11. Where employees of an employer reside on the property of the employer, or on property to which the employer has the right to control access, the employer shall, upon a direction from the Board, allow the representative of a trade union access to the property on which the employees reside for the purpose of attempting to persuade the employees to join a trade union.

It is conceded that employees of the respondent reside on the subject property and that the respondent has the right to control access to that property. It should be noted that the site can only be reached by land over a road controlled by another company. It is understood that this application does not affect that company's rights. The respondent does not oppose our granting some direction. The parties' dispute is over the terms of the direction.

2. The applicant does not dispute the Board's jurisdiction to include limiting terms in a direction under section 11. It agrees to terms similar to those contained in the Board's decision in *Great Lakes Forest Products Ltd.*, [1987] OLRB Rep. Sept. 1136, with the necessary changes. Those terms would be:

- (a) before attempting to enter the camp, the applicant shall notify Jack Cameron or Geoff Akehurst or their designate not later than the close of business on the last business day prior to the day on which access is desired.
- (b) There shall be no solicitation of an employee during the employee's working hours.
- (c) While in the camp, the representatives of the applicant will obey all camp rules and regulations by which employees' conduct is governed including those relating to the use of safety equipment.
- (d) At the time of entering the camp the union representative(s) must notify the camp attendant or his designated representative if he or she is reasonably available.

3. The respondent says that the direction should be on the following terms:

- (1) Access restricted to the entire mess hall building.
- (2) Access would take place without interference, surveillance, or presence by management.
- (3) Access would be for any two of E. Kaplanis, P. Maley or B. Madigan.
- (4) The applicant to give 24 hours notice to either Jack Cameron or Geoff Akehurst.
- (5) Respondent to post a notice setting out the time and date of access meeting prepared by the applicant.
- (6) The applicant shall be allowed access for one and one-half hours at 3:00 p.m. and 8:00 p.m. one day a week for four consecutive weeks and such period of access to expire on or before January 31, 1988 in any event.
- (7) The applicant to have the use of the telephone room in the mess hall for private meetings with the employees.
- (8) The applicant to have no access whatsoever to the bunk houses of the employees.

4. There is some disagreement about the facts. For example, the employer says that there are about 30 employees at the subject property while the union says that there are 40. These and other differences are not material to our disposition of this application.

5. Respondent counsel argues that the terms granted in the *Great Lakes* case must have been agreed to, as there is no explanation in that decision of how those terms were arrived at. Counsel for the respondent cites *Smith's Construction Company Arnprior Limited*, [1973] OLRB Rep. Aug. 428; *Selco Mining Corporation Limited*, [1974] OLRB Rep. Nov. 818; *Ledcore Construction Limited* (1985), 85 CLLC ¶16,055; and *Consolidated Canadian Farraday Limited*, [1974] OLRB Rep. Jan. 5 as decisions granting access on terms as restrictive as its proposed terms, at least with respect to frequency and duration of visits and the term during which the order would be operative. We note that the three Ontario Board decisions contain no more analysis of the terms imposed than does the decision in the *Great Lakes* case. The *Ledcore* decision from British Columbia explicitly notes that the terms imposed are those that were proposed by the union applicant in that case.

6. Counsel for the applicant points to a number of more recent decisions incorporating agreed-upon terms: *Teck Corporation*, (Board File 2828-83-M, unreported decision dated April 2, 1984); *Noranda Mines Limited*, (Board File Nos. 1085-83-M, 1100-83-M and 1306-83-M, unreported decision dated October 3, 1983); *Noranda Mines Limited*, (File 1570-83-M, unreported decision dated November 16, 1983); *Campbell Red Lake Mines Limited*, (unreported decision dated March 30, 1982) and *Gaston H. Poulin Contractor Limited*, [1987] OLRB Rep. Jan. 48. These are offered as evidence of what is reasonable in terms of protecting any legitimate employer interest. We have no way of assessing the differences, if any, between the interests of those employers and the interests of the respondent in this case. Moreover, it is not apparent why the passage of time would have made these decisions any more representative of what is reasonable than are the decisions cited by the respondent.

7. None of the cases cited deals with the matter of access to the bunk house. The respondent says each bunk house consists of a series of rooms adjoining a common hallway. Two persons reside in each room. Generally one is a day shift employee and the other works on the night shift. There are also bunk houses in which employees of the Ministry of Transportation and Communication reside; sometimes a bunk house may contain both employees of the respondent and employees of the MTC. Bunk house rooms are locked. Only the occupants of a room have unrestricted access to it. While a member of management could enter the bunk house hallway and knock on a door, he or she could not enter a room except on the invitation of an occupant. Presumably the two occupants work out between themselves what authority either has to admit visitors in the absence of the other.

8. The respondent argues that access should not be granted to bunk houses because that would infringe on rights of employees living there, employees who have had no notice that these rights were in jeopardy in this application. The respondent also argues that organizing is better conducted in the mess hall than in bunk houses where walls are paper thin and the total absence of management personnel cannot be guaranteed.

9. The purpose of section 11 was addressed in *Domtar Inc.*, [1987] OLRB Rep. April 485, at paragraphs 8 and 9:

8. The freedom to join a trade union (or, as in this case, change unions) may be seriously impeded where the employees not only work but also reside on the property of their employer. In those circumstances, absent a direction of the kind envisaged by section 11, the employer would have the right to control access to the employees even on non-working time. Any union organizer who entered onto the employer's property without permission would run the risk of being charged with trespass (see *R. v. Labelle* (1965), 48 D.L.R. (2d) 37, 65 CLLC ¶14.056). But in a system based upon membership cards signed by the employees, such contact is imperative if a certification application is to be successfully launched. That is why what is now section 11 of the Act was added in 1970 to remove this impediment. To this extent, a Board direction under section 11 does limit or modify the employer's pre-existing property rights.

9. ... Anything which delays or impedes access to the employees for the purpose of signing membership cards may limit their right to be represented by the union of their choice; and section 11 makes it abundantly clear that such contact should not be limited solely because the employer controls access to the premises on which the employees reside.

In *Domtar* an argument was made that an access order would interfere with the rights of an incumbent trade union. In addressing this argument the Board made these observations in paragraph 10:

Obviously any direction to the company granting access to its property will have an incidental tactical effect on Local 2693. However we are not persuaded that the incumbent's legal rights as opposed to those of the company would be affected in any way. The CPU is not seeking here anything significantly different from the direction already granted in the case involving Abitibi-Price. The CPU merely wants a better opportunity to speak to Domtar's employees. Local 2693 remains the employees' bargaining agent with all rights, privileges and duties associated with that status. Local 2693 continues to have any rights accorded it under the collective agreement. Its rights under the Act are not impeded in any way. Should a certification application be made, it would have the right to intervene in opposition and if a representation vote were held, it would appear on the ballot. Nothing in a Board direction granting access to representatives of the CPU (typically on terms such as that they give the employer notice in advance, abide by any camp safety rules, etc.) would restrict an incumbent's right to campaign. Nothing in a Board direction would alter the incumbent's pre-existing right to communicate with its members. *And nothing in such Board direction to the employer would impinge upon the rights of the incumbent's members. The only effect on them and again it is incidental is that they may be more exposed for a*

time to a certain amount of salesmanship which they are quite capable of assessing and rejecting if that is their wish.

[emphasis added]

10. A section 11 direction interferes with an employer's right to restrict access to property over which the employer has control. Subject to the terms of the direction, the employer is prevented from denying access to the union's representative. Employees, however, are not prevented from denying access to their private rooms. They are not obliged to speak with the union representative. They are not obliged to go to any meeting. Union representatives are simply put in the same position as any resident employee, so that opportunities for communication are not limited by the assertion of employer property rights any more than would be the opportunities for communication between resident employees. The respondent has not identified any legitimate interest it may have as employer or in relation to the property which would not be adequately served by the terms proposed by the applicant plus the following:

- (e) Access on any given day shall be by no more than 3 of E. Kaplanis, P. Maley, B. Madigan and/or any person or persons bearing the written authorization of one of the foregoing.
- (f) Access shall occur between the hours of 9:00 a.m. and 10:00 p.m.
- (g) This order shall expire on the terminal date fixed for any application for certification by the applicant with respect to employees of the respondent residing at the property in question.

We hereby direct that the respondent grant the applicant access on those terms.

0923-86-R International Union of Operating Engineers, Local 796, Applicant v. **Les Ingenieries Consbec Inc.**, Respondent v. Labourers' International Union of North America, Ontario Provincial District Council, Labourers' International Union of North America, Local 607, Intervener

Certification - Membership Evidence - Parties - Form of evidence acceptable to Board when considering intervener status - Labourers' Union claiming intervener status on the ground that it represented employees in the unit - One of the employees for whom evidence was filed was on the employer's list and represented by the Union when the hearing began - Labourers' Union having status to intervene

BEFORE: *Patricia Hughes*, Vice-Chair, and Board Members *F. W. Murray* and *H. Kobryn*.

APPEARANCES: *Jack J. Slaughter*, *Celine Castonguay* and *Edward Kaplanis* for the applicant; *Daniel J. Shields*, *Tim Murphy* and *Archie Cameron* for the respondent; *C. M. Mitchell*, *T. Conolly* and *B. Kuazah* for the intervener.

DECISION OF THE BOARD; November 27, 1987

1. In a decision dated December 9, 1986 and confirmed in decision dated March 6, 1987,

denying a request for reconsideration by Labourers' International Union of North America, Ontario Provincial District Council, Labourers' International Union of North America, Local 607 ("the Labourers"), the parties in this matter were requested to make submissions on the following three issues related to whether we should grant the Labourers intervener status in this application for certification by International Union of Operating Engineers, Local 796 ("Local 796"):

(a) do dues check-off lists constitute membership evidence for the purpose of determining intervener status in a certification application, particularly when there is a closed shop involved;

(b) when is the appropriate time for determining whether a union seeking intervener status represents one or more of the employees in the bargaining unit (that is, must an employee the union claims to represent be a member of the bargaining unit on the application date, fall within the 30-30 rule or can the employee be a member at any time up to the date of hearing); and

(c) when is the union seeking intervener status required to file membership evidence in support of that claim, particularly if notice has not been sent to the union prior to the terminal date?

2. A union may be granted intervener status in an application for certification if it is the bargaining agent for the employees in the bargaining unit or if it represents one or more employees in the bargaining unit: *Atlantic Packaging Product Ltd.*, [1980] OLRB Rep. Jan. 4; *Abitibi-Price Inc.*, [1984] OLRB Rep. Sept. 1155. In this case, the Labourers relied on the second part of the test.

3. On the first day of hearing, November 20, 1986, the Labourers filed one certificate of membership, a Local 607 Membership Ledger Card and two dues check-off lists as evidence that they represented employees in the bargaining unit. Subsequently, on January 26, 1987, they filed three Local 607 Membership Ledger Cards. In total, they submitted evidence of membership for four persons. Of the four, three were agreed by the parties on an inquiry by a Labour Relations Officer into the status of individuals the Labourers had sought to be added to the employer's list (see the December 9th decision, paragraphs 6 and 7) to not be within the 30-30 rule. The fourth individual was on the list filed by the employer as someone eligible for the count.

4. The Board applies strict rules to membership evidence filed for purposes of a certification application (see Rule 73 of the Board's Rules of Procedure). Effectively, the Board accepts only applications for membership and a signed receipt or certificates of membership as evidence in a certification application. In an application for intervener status, however, the Board is willing to accept other forms of evidence which show that the union seeking status does represent the employees it claims to represent. In *Spring Plastering Limited*, [1967] OLRB Rep. Dec. 887, the Board had to determine whether the applicant had status to seek a declaration that the respondent union was not entitled to represent the employees of the intervener in the bargaining unit. To bring such an application, a trade union must "represent[] any employee in the bargaining unit". The evidence of representation does not have to be the same as in a certification application. The respondent was required to show it was entitled to represent employees at the time the first collective agreement between it and the intervener was entered into. The respondent submitted evidence that, although it would not satisfy the requirements of membership evidence in an application for a certification, was accepted by the Board which explained at paragraph 10 that

[e]vidence that the trade was entitled to represent the employees may well take a different form from the evidence of membership required on an application for certification. It must be

remembered that any documentary evidence of the right of a trade union to represent employees was not necessarily prepared with a view of applying for certification and accordingly could reflect the desire of the employees to have the union represent them without complying with the Board's stringent tests of membership.

This approach was cited with approval in *Wardet Limited*, [1984] OLRB Rep. Jan. 153 where the intervener submitted its computer membership records and was granted status to intervene in the certification application. We are satisfied the evidence submitted by the Labourers is adequate to establish it represents those persons on whom the Labourers base their claim to status.

5. Similarly, the Board is rigorous in requiring that all membership evidence in a certification application be filed by the terminal date, while establishing a specific temporal point in a request for intervener status is not as necessary: we adopt the position expressed in *Runnymede Development Corporation Limited*, [1987] OLRB Rep. Oct. 1305 that "documentary evidence of membership upon which an intervention ... is based, is filed in a timely manner so long as it is before the Board at the time the issue the intervener's right to participate is being dealt with [citation omitted]". The evidence in this case was therefore filed in a timely manner.

6. As indicated, three of the persons in relation to whom the Labourers assert their claim to intervene in this application would not be employees for the purpose of the count. In *Runnymede, supra*, the Board indicates that an employee who is not "on the list" is not an "affected" employee and could not intervene in the application; a union basing its claim to intervene on its representation of that person, therefore, could also not intervene. To the extent that that means an employee must satisfy the 30-30 rule to be an "affected" employee, we have some concern with the statement. The 30-30 rule applies for a specific purpose, just as does the terminal date and the nature of membership evidence acceptable in a certification application. Whether an employee is at work on a *specific* date or during a *specific* period does not seem to us relevant to whether he or she is affected by the application for the purpose of permitting the employee to raise issues of relevance to the application as an intervener. We do not have to determine that issue, however, since one of the employees for whom evidence was filed is on the employer's list (and has not been challenged) and was represented by the Labourers when the hearing began.

7. Accordingly, we find that the Labourers have status to participate as intervener in this application.

8. At the outset of the hearing, counsel for Local 796 filed a letter with the Board, dated November 12, 1987, seeking particulars of the allegations filed on November 19, 1986, by the Labourers. After some discussion of the matter, it became clear that the allegations related to the relationship between International Union of Operating Engineers, Local 793 ("Local 793") and Local 796. Local 793 had previously filed an application for certification for these same employees which was dismissed by a differently constituted panel in Board File No. 2992-85-R dated July 15, 1986 because of employer involvement. The Labourers had intervened in that application. Counsel for the Labourers stated that he did not have evidence of employer involvement in the actual application before us at the time of hearing. On that understanding of the allegations, counsel for Local 796 was therefore satisfied he has sufficient particulars, subject to any further allegations with respect to employer involvement in this application.

9. This matter is to be set down for hearing to deal with all outstanding matters in this application. The first issue to be addressed by the parties is the allegations filed by the Labourers.

0977-87-G International Brotherhood of Electrical Workers' Local 586 and Local 594, Applicants v. 291360 Ontario Limited c.o.b. as **Lorne's Electric**, Respondent

Abandonment - Bargaining Rights - Construction Industry - Whether union had abandoned its bargaining rights in the ICI sector of the construction industry - Employee bargaining agency continuing to exercise its bargaining rights every two years - Union failing to seek enforcement of the provincial agreement - No abandonment of ICI rights

BEFORE: *Robert D. Howe*, Vice-Chair, and Board Members *R. M. Sloan* and *J. Sarra*.

APPEARANCES: *Bernard Fishbein*, *Maurice Walsh* and *Thomas Moffatt* for the applicant; *James W. Touhey* and *Lorne Bretzlaff* for the respondent.

DECISION OF THE BOARD; November 27, 1987

1. This is a referral of a grievance to the Board pursuant to section 124 of the *Labour Relations Act*. The grievance, which was delivered to the respondent (also referred to in this decision as the "Company") on or about May 12, 1987, and filed with the Board on July 9, 1987, alleges a number of violations of the May 28, 1986 to April 30, 1988 provincial agreement between the Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario (the "E.T.B.A."), and the International Brotherhood of Electrical Workers (the "International") and the I.B.E.W. Construction Council of Ontario (the "Council").

2. This referral was originally scheduled to be heard on July 23, 1987. However, in a decision dated July 21, 1987, another panel of the Board adjourned the application *sine die* (for a period not exceeding one year) on the agreement of the parties. Counsel for the applicants (also referred to compendiously in this decision as the "Union") subsequently requested that the matter be rescheduled for hearing. Accordingly, the matter was listed for hearing on October 27, 1987, before the present panel.

3. In a letter dated September 24, 1987 to the Board's Registrar, counsel for the respondent wrote, in part, as follows:

I wish to advise you that I have been retained to act on behalf of the Respondent in respect of the Hearing which is to take place before the Board on October 27, 1987 at 9:30 a.m.

• • • •

I also wish to advise you on behalf of the Respondent that it will be its position at the Hearing that the Applicant has, in fact, abandoned its right to bargain for the employees of the Respondent because of an extremely lengthy period of inactivity and, further, the Respondent will be seeking a declaration that the Applicant no longer represents the employees of the respondent.

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At the commencement of the hearing on October 27, 1987, counsel for the applicants and counsel for the respondent advised the Board that they were in agreement that the abandonment issue should be determined by the Board as a preliminary matter, and that in the event that the Board found there to have been no abandonment, the merits of the grievance should be dealt with at another hearing. Accordingly, this decision will be confined to that preliminary issue.

4. Although the issue of abandonment was raised by the respondent, the parties were in agreement that it was appropriate for the Union to be the first party to call evidence concerning

that issue. Respondent's counsel told the Board during his opening statement that the Company had paid the expenses of its second most senior employee, Mr. Eastman, whom he intended to call as a witness in order to establish that, prior to the grievance which gave rise to these proceedings, there had been no contact between the Union and any of the employees of the respondent since April of 1982, when Mr. Eastman commenced employment with the Company. After the Union had called two witnesses (Thomas Moffatt and Maurice Walsh) and closed its case (in chief) concerning the preliminary issue, counsel for the respondent advised the Board that his client would not be calling any evidence. We then heard Union counsel's argument with respect to the preliminary issue, followed by Company counsel's argument and reply argument by Union counsel. After Union counsel had completed his reply argument, Company counsel told the Board that Mr. Eastman had advised him that he (Mr. Eastman) had a petition signed by seventeen employees of the Company. However, Company counsel also indicated that he was not acting for Mr. Eastman. After Union counsel objected to that belated reference to a petition, neither Company counsel nor Mr. Eastman sought to have the case reopened for the purpose of hearing evidence regarding the petition. Had such a request been made, it would have been rejected on the basis that argument had already been completed regarding the preliminary matter, and on the further basis that a petition, although potentially relevant in other proceedings (such as an application for termination of bargaining rights under section 57 of the Act), would be of no relevance in determining the issue of abandonment, which is a question of fact to be determined on the basis of the actions, and the inaction, of the Union, not on the basis of the wishes of the employees with respect to representation (or continued representation) by the Union.

5. Local 586 was certified by the Board, differently constituted, on January 5, 1977 (in File No. 1645-76-R) for the following bargaining unit:

all electricians in the employ of the respondent in the County of Renfrew, save and except non-working foremen and persons above the rank of non-working foreman.

(For ease of reference, the persons within the scope of that bargaining unit are referred to in this decision as the "employees".) Shortly after receiving its certificate, Local 586 served the respondent with notice to bargain and arranged for a bargaining meeting to be held at the office of James W. Touhey, counsel for the respondent. At that meeting, Thomas Moffatt, who has been the Business Manager of Local 586 since 1975 (and had been its Assistant Business Manager for seven years before that), advised the respondent that Local 586 would not attempt to enter into a collective agreement with the Company until it had organized some other shops in the area. There is no evidence before the Board with respect to whether or not any other shops were ever in fact organized. However, it is clear from the totality of the evidence that neither Mr. Moffatt nor any other Union official ever told the respondent that the Union would abandon its bargaining rights if it was unable to organize other shops in the area.

6. On May 24, 1977, Mr. Touhey wrote to Mr. Moffatt as follows, on behalf of the Company:

I have recently been advised by Mr. Lorne Bretzlaff that at the present time he only has two employees on his payroll. He is desirous of increasing their hourly rate to \$8.00 and also of increasing their vacation pay from 6% to 8%. Would you please advise me whether or not it will be in order for Mr. Bretzlaff to do the aforementioned.

On June 9, 1977, Mr. Moffatt telephoned Mr. Touhey and consented to those changes in terms and conditions of employment (pursuant to what is now section 79(1) of the Act). That consent was recorded in the following letter, which was sent by Mr. Touhey to Mr. Bretzlaff (a principal of the respondent), with a copy to Mr. Moffatt:

I this day received a telephone call from Mr. Thomas K. Moffatt of the International Brotherhood of Electrical Workers and he advised me that it would be in order for you to increase the hourly rate of your employees to \$8.00 and also increase their vacation pay from six to eight per cent. Hence you may proceed to put into effect these increases as soon as you wish.

7. Since 1970, the territorial jurisdiction of Local 586 had included Board Area 14 (the County of Renfrew) and Board Area 15 (the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell). However, conflict had arisen between the Renfrew County unit and the Ottawa-Carleton unit, as a result of which representatives of Local 586 approached the International in late 1977 and (in the words of Mr. Moffatt) “requested a divorce”. Jurisdiction over Renfrew County was ultimately transferred from Local 586 to Local 594 in June of 1978. However, Mr. Moffatt and other officials of Local 586 knew for some time before then that a transfer was likely to occur. Thus, they “set aside” their bargaining and organizing activities in respect of Renfrew County, as they anticipated that the area was soon going to be transferred to another local.

8. In June of 1978, the International chartered Local 594 and established Renfrew County as its territorial jurisdiction. At that time Local 594 had only twenty-five members. (It currently has about sixty-three.) Maurice Walsh, who has been the (part-time) Business Manager of Local 594 since its inception, was aware that the Local had bargaining rights for employees of the respondent by virtue of the aforementioned certificate. On January 19, 1979, he made a (long distance) telephone call to the Company’s office and sought to speak with Mr. Bretzlaff, with a view to arranging to meet with him for the purpose of negotiating a collective agreement. Since he was unable to speak with Mr. Bretzlaff, Mr. Walsh left a message for Mr. Bretzlaff to call him. However, his call was not returned. Mr. Walsh visited the respondent’s office on August 30, 1979, in a further unsuccessful attempt to speak with Mr. Bretzlaff. It was Mr. Walsh’s recollection that he either left copies of sample collective agreements with a secretary in the respondent’s office that day, or mailed them to the respondent around that time. On April 29, 1980, he again attended at the respondent’s office in an attempt to meet with Mr. Bretzlaff for the purpose of negotiating a collective agreement. In his testimony before the Board, Mr. Walsh said that he did not remember whether or not he met with Mr. Bretzlaff on that occasion. He also told the Board, “I went to the [respondent’s] shop three times. Out of the three times, I spoke to Mr. Bretzlaff once.” The contents of his conversation with Mr. Bretzlaff on that occasion are not disclosed by the evidence. Mr. Walsh made no further efforts to contact the respondent until March 25, 1985, when he once again telephoned the respondent’s office, attempted unsuccessfully to speak with Mr. Bretzlaff, and left a message for Mr. Bretzlaff to call him. That call was also not returned. Prior to the grievance which gave rise to these proceedings, Mr. Walsh had never been in contact with any of the employees of the respondent.

9. In 1977, the amendments contained in *The Labour Relations Amendment Act, 1977*, S.O. 1977, c. 31, introduced concepts of province-wide bargaining and province-wide collective agreements between employee bargaining agencies and employer bargaining agencies in the industrial, commercial and institutional sector of the construction industry (the “ICI sector”). Pursuant to what is now section 139(1)(a) of the Act (then section 127(1)(a)), on December 12, 1977 Dr. Bette Stephenson, who was then the Minister of Labour (the “Minister”), designated the International and the Council as the employee bargaining agency to represent in bargaining in the ICI sector of the construction industry all journeymen and apprentice electricians and linemen represented by the International or by various locals (including Local 586). (For ease of exposition, the International and the Council are also referred to compendiously in this decision as the “Employee Bargaining Agency”.) On the same day, the Minister also designated the E.T.B.A. as the employer bargaining agency, pursuant to what is now section 139(1)(b) of the Act. (For ease of exposition, the E.T.B.A. is also referred to in this decision as the “Employer Bargaining Agen-

cy".) Negotiations between the Employer Bargaining Agency and the Employee Bargaining Agency (pursuant to the province-wide bargaining provisions of the Act) culminated in a provincial agreement which became effective on May 5, 1978, and expired on April 30, 1980. Since that time, provincial agreements have been negotiated by those bargaining agencies every two years (in accordance with section 146(3) of the Act, which requires that every provincial agreement "provide for expiry of the agreement on the 30th day of April calculated biennially from the 30th day of April, 1978").

10. On May 1, 1980, the scope of the Employee Bargaining Agency's bargaining rights was expanded by the "deemed recognition" provision contained in what is now section 137(2) of the Act (enacted by *The Labour Relations Amendment Act, 1979 (No. 2)*, S.O. 1979, c. 113, s. 1), which provides:

Where an employer is represented by a designated or accredited employer bargaining agency, the employer shall be deemed to have recognized all of the affiliated bargaining agents represented by a designated or certified employee bargaining agency that bargains with the employer bargaining agency as the bargaining agents for the purpose of collective bargaining in their respective geographic jurisdictions in respect of the employees of the employer employed in the industrial, commercial or institutional sector of the construction industry referred to in clause 117(e), except those employees for whom a trade union other than one of the affiliated bargaining agents holds bargaining rights.

11. Neither Local 586 nor Local 594 filed a grievance or took any other steps prior to March of 1987 to assert that the respondent was bound by the provincial agreement. Mr. Moffatt and Mr. Walsh were both uncertain about how the Union's bargaining rights in respect of the respondent's employees were affected by the province-wide bargaining provisions of the Act. However, neither of them sought any legal advice concerning that matter until March of 1987, although they were both aware that the respondent was openly carrying on business as an electrical contractor within their respective territorial jurisdictions during the intervening ten-year period, without employing any Union members, remitting any Union dues, or otherwise complying with the provisions of the provincial agreement. As indicated above, Mr. Walsh had no contact with any of the employees of the respondent at any time prior to 1987. Mr. Moffatt's sole contact with employees of the respondent between 1978 and 1987 occurred in 1985, when he spoke with Mr. Eastman (who had once been a member of the Union) and another employee of the respondent, both of whom told Mr. Moffatt that they did not want to have anything to do with the Union.

12. Counsel for the applicants submitted that there was no abandonment of bargaining rights in respect of the respondent's employees during the period between January 5, 1977 (the date of certification) and December 12, 1977 (the date of the aforementioned designations which brought within the purview of province-wide bargaining the Employee Bargaining Agency and all employers for whose employees it or its affiliated bargaining agents (such as Local 586) had bargaining rights in the ICI sector). It was his position that this period constituted the only "window of opportunity" during which the bargaining rights could have been abandoned. In this regard, he referred the Board to *Culliton Brothers Limited*, [1982] OLRB Rep. March 357, and a number of other authorities.

13. Counsel for the respondent submitted that the Union had abandoned its bargaining rights. It was his position that abandonment could and did occur after the province-wide bargaining provisions of the Act came into force. He also submitted, in the alternative, that the Union had abandoned its bargaining right prior to that time.

14. The concept of abandonment is well established in the Board's jurisprudence. See, for

example, *Hugh Murray Limited*, [1979] OLRB Rep. July 664, in which the Board wrote, in part, as follows:

10. At the hearing counsel for the union contended that the Board had no jurisdiction to conclude that the union had lost its bargaining rights through abandonment. With this we are unable to agree. Although unions generally obtain and lose bargaining rights through the certification and termination procedures set forth in the Act, the Board has long recognized that bargaining rights may also be acquired through the voluntary recognition of a union by an employer, and lost through the voluntary abandonment of those rights by a trade union. Apparently the first case where the Board concluded that a union had abandoned its bargaining rights was *Guelph Cartage Co.* 55 CLLC ¶18,018. In that case a union which had been certified in August 1948 did not serve a notice to bargain on the employer until July of 1955. When the matter came before the Board, the Board ruled that since the union had “slept on its rights” for seven years it could not now call upon the employer to enter into negotiations. A summary of the type of situations where the Board has applied the principle of abandonment since that first case is set out as follows in the *J.S. Mechanical* case, [1979] OLRB Rep. Feb. 110:

“Over the last 20 years the principle of abandonment has been deeply entrenched in the Board’s jurisprudence. Once a union has obtained bargaining rights either through certification or voluntary recognition it is expected that it will actively promote those rights. If a union declines to pursue bargaining rights it may lose them through disuse. Whether a union has abandoned its bargaining rights is a matter which must be assessed on the facts of each individual case, but once the Board is satisfied that a union has failed to preserve its rights, the union may no longer rely on them to support the appointment of a Conciliation Officer under section 15 of the Act (see *Cooksville Sheet Metal*, [1974] OLRB Rep. June 365; *John Entwistle Construction Limited*, [1972] OLRB Rep. Oct. 919; *Elgin Construction Co. Limited*, [1969] OLRB Rep. April 134; *Guelph Cartage Company*, 55 CLLC ¶18,018). As well, if a union has abandoned its bargaining rights it may be precluded from relying on them either to bar another agreement that renews itself automatically (see *Catalytic Enterprises Limited*, [1974] OLRB Rep. April 264; *O. & W. Electronics Limited*, [1970] OLRB Rep. Jan. 1213; *Architectural Acoustics & Drywall*, [1970] OLRB Rep. Feb. 1408; *N.W. Clayton Sheetmetal and Heating Co. Ltd.*, [1967] OLRB Rep. April 69), or to require an employer to bargain by giving notice to bargain under such an agreement (see *Rainee Manufacturing Products Limited*, [1967] OLRB Rep. Nov. 796). A union’s abandonment might also obviate the necessity for the Board to determine the merits of a termination application (see *Graphic Centre (Ontario) Inc.*, [1977] OLRB Rep. June 379; *Northern Engineers & Supply Co. Limited*, [1968] OLRB Rep. Oct. 731; *Barrie Tanning Limited*, [1966] OLRB Rep. May 128).”

An application for judicial review of that (and another) decision was dismissed in *Re Carpenters’ District Council and Hugh Murray (1974) Ltd.* (1980), 33 O.R. (2d) 670, in which the Divisional Court confirmed that it is within the Board’s jurisdiction to determine whether or not a trade union has abandoned bargaining rights which it obtained by means of certification (or voluntary recognition).

15. Counsel for the respondent sought to rely upon *Hugh Murray* as an example of bargaining rights being abandoned by a trade union in the context of the province-wide bargaining provisions of the Act. However, it is clear from the Board’s decision in that case that the Board found that the abandonment had occurred *prior* to the onset of province-wide bargaining; in paragraph 9 of that decision, the Board wrote as follows:

When all of the evidence is considered we are satisfied that although the Act continued the union’s bargaining rights and allowed it to serve notice to bargain on *Hugh Murray (1974) Limited*, for reasons of its own the union chose not to do so, but rather at all times acted as though it did not have bargaining rights for the company’s employees. On these facts we can only conclude that the union voluntarily abandoned, or gave up, its bargaining rights, and that it did so prior to the designation of the employee and employer bargaining agencies by the Minister of Labour in March of 1978.

16. In *J.S. Mechanical*, [1979] OLRB Rep. Feb. 110, the Board listed some of the factors which it has generally found to be of assistance in deciding whether or not an abandonment of bargaining rights has occurred:

5. In assessing the bargaining relationship between the union and the employer to determine whether or not a union has abandoned its bargaining rights, the Board considers various factors. Among other possible indicators, the Board looks to the length of the union's inactivity, whether it has made attempts to negotiate or renew a collective agreement, whether the union has sought to administer the collective agreement through the grievance and arbitration provisions in the collective agreement, whether terms and conditions of employment have been changed by the employer without objection from the union as well as whether there are any extenuating circumstances to explain an apparent failure to assert bargaining rights.

17. It is clear from the facts set forth above that Local 586 did not abandon its bargaining rights in respect of the respondent's employees between January 5, 1977 (the date on which it was certified) and December 12, 1977 (the date on which the aforementioned designations came into effect). As noted above, shortly after receiving its certificate, Local 586 served the respondent with notice to bargain, and arranged for a bargaining meeting to be held. At that meeting, Mr. Moffatt advised the Company that Local 586 would not attempt to enter into a collective agreement with the respondent until it had organized some other shops in the area. As is evident from Mr. Touhey's letter of May 24, 1977 to Mr. Moffatt, and his letter of June 9, 1977 to Mr. Bretzlaff, the Company recognized that the Union continued to have bargaining rights for the respondent's employees following that meeting. Consequently, it sought and obtained (through its counsel) the Union's consent to the changes in terms and conditions of employment described in that correspondence. The Minister made the aforementioned designations approximately six months later. The fact that Local 586 did not seek to bargain with the respondent during that six-month period did not constitute an abandonment of its bargaining rights in the circumstances of this case. As indicated above, Mr. Moffatt had expressly advised the Company earlier that year that Local 586 would not enter into a collective agreement with the respondent until it had organized some other shops in the area. It may reasonably be inferred that this arrangement, under which the Union was voluntarily holding its bargaining rights in abeyance pending further organizational activities, was mutually satisfactory to the Union and the Company.

18. For the foregoing reasons, we find that Local 586 continued to hold bargaining rights in respect of the respondent's employees on December 12, 1977, when the Minister made the aforementioned designations. The effect of those designations was to take bargaining in respect of the ICI sector out of the hands of Local 586 and the Company, and to put it into the hands of the Employee Bargaining Agency and the Employer Bargaining Agency; see sections 142 and 143 of the Act, which provide as follows:

142. Where an employee bargaining agency has been designated under section 139 or certified under section 140 to represent a provincial unit of affiliated bargaining agents, all rights, duties and obligations under this Act of the affiliated bargaining agents for which it bargains shall vest in the employee bargaining agency, but only for the purpose of conducting bargaining and, subject to the ratification procedures of the employee bargaining agency, concluding a provincial agreement.

143. Where an employer bargaining agency has been designated under section 139 or accredited under section 141 to represent a provincial unit of employers,

- (a) all rights, duties and obligations under this Act of employers for which it bargains shall vest in the employer bargaining agency, but only for the purpose of conducting bargaining and concluding a provincial agreement; and
- (b) an accreditation heretofore made under section 127 of an employers' organ-

ization as bargaining agent of the employers in the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) represented or to be represented by the employer bargaining agency is null and void from the time of such designation under section 139 or accreditation under section 141.

Collective bargaining between those designated entities culminated in the aforementioned provincial agreement, which was entered into on May 5, 1978, and remained in effect until April 30, 1980.

19. There is no evidence before the Board regarding whether or not Mr. Bretzlaff (or any other member of the respondent's management) was aware that the Company was legally bound by the provincial agreement, by virtue of what is now section 147(2) of the Act (then section 134(2)), which provides:

A provincial agreement is, subject to and for the purposes of this Act, binding upon the employer bargaining agency, the employers represented by the employer bargaining agency, the employee bargaining agency, the affiliated bargaining agents represented by the employee bargaining agency, the employees represented by the affiliated bargaining agents and employed in the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e), and upon such employers, affiliated bargaining agents and employees as may be subsequently bound by the said agreement.

The evidence does, however, clearly establish that neither Mr. Moffatt nor Mr. Walsh were aware that the Company was bound by the provincial agreement, and that neither they nor any other Union official took any steps (prior to 1987) to require the Company to comply with it. Indeed, after Local 594 was given territorial jurisdiction over Renfrew County in June of 1978, Mr. Walsh made a number of attempts (as described above) to contact Mr. Bretzlaff with a view to negotiating a collective agreement. Although the province-wide bargaining provisions of the Act did not (and do not) preclude local collective bargaining in respect of other sectors, to the extent that Mr. Walsh was attempting to bargain with the respondent for a collective agreement in respect of the ICI sector, his actions were prohibited by what is now section 146(2) of the Act (then section 133(2)), which provides:

On and after the 30th day of April, 1978 and subject to sections 139 and 145, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with subsection (1) is null and void.

20. In the spring of 1978, the Union's bargaining rights in respect of the respondent's employees in the ICI sector were being actively exercised by the Employee Bargaining Agency which, by virtue of the combined effect of the province-wide bargaining provisions of the Act and the Minister's employee bargaining agency designation dated December 12, 1977, had become their bargaining agent in that sector for the purpose of conducting collective bargaining and concluding a provincial agreement. The Employee Bargaining Agency's bargaining efforts culminated in the May 8, 1978 to April 30, 1980 provincial agreement, which was negotiated on behalf of the respondent (and numerous other employers) by the Employer Bargaining Agency. Thereafter, the Employee Bargaining Agency continued to exercise its bargaining rights in respect of the respondent's employees in the ICI sector every two years, in accordance with the province-wide bargaining provisions of the Act. The exercise of those bargaining rights gave rise to four successive two-year provincial agreements following the initial provincial agreement, the most recent of which is the aforementioned May 28, 1986 to April 30, 1988 provincial agreement.

21. Having regard to all of the circumstances, we find as a fact that there has been no abandonment of the ICI sector bargaining rights granted to Local 586 by the Board's certificate of January 5, 1977, and subsequently vested in the Employee Bargaining Agency (for the purpose of conducting bargaining and concluding a provincial agreement) by the combined legal effect of section 142 of the Act and the aforementioned employee bargaining agency designation dated December 12, 1977. In reaching this conclusion, we are not unmindful of the fact that the Union has not, prior to 1987, sought to enforce or administer the provincial agreement vis-a-vis the respondent. As indicated in *J.S. Mechanical, supra*, one of the factors which the Board has generally considered in cases involving allegations of abandonment of bargaining rights is "whether the union has sought to administer the collective agreement through the grievance and arbitration provisions in the collective agreement". Where a trade union that has years earlier negotiated a collective agreement, which purports to have automatically renewed itself without any further bargaining (by virtue of a renewal provision), seeks to belatedly negotiate a new collective agreement or to raise the old collective agreement as a bar to a second trade union's application for certification, the fact that the first trade union has not for a number of years sought to enforce or administer the collective agreement by means of its grievance and arbitration provisions is clearly a pertinent factor to be considered in determining whether that trade union has in fact abandoned its bargaining rights. However, that factor is of little or no assistance in determining whether an abandonment of bargaining rights has occurred in the context of ICI sector province-wide bargaining, where the party which by law holds the bargaining rights for purposes of conducting collective bargaining and entering into a provincial agreement (i.e., the employee bargaining agency) is not the party which administers the provincial agreement at the local level. The Act's bifurcation of bargaining and administration of the provincial agreement renders an affiliated bargaining agent's failure to administer the provincial agreement vis-a-vis an employer of little or no consequence in determining whether the employee bargaining agency has abandoned its bargaining rights in respect of the employees of that employer. Even if the two-year period between rounds of province-wide bargaining were a sufficiently lengthy interval to warrant the drawing of an inference that a particular affiliated bargaining agent had abandoned the provincial agreement vis-a-vis a particular employer in its geographic jurisdiction (which, in our view, it is not), that would not preclude other affiliated bargaining agents from enforcing the provincial agreement vis-a-vis that employer in their respective geographic areas. Moreover, when the next round of province-wide bargaining occurred, the employee bargaining agency would be able to rely upon the "deemed recognition" provisions set forth in section 137(2) of the Act to assert that the employer was, for the purposes of the new round of bargaining, deemed to have recognized all of the affiliated bargaining agents represented by it, including that particular affiliated bargaining agent.

22. An argument similar in substance to that made by Mr. Touhey on behalf of the Company was considered and rejected in *Culliton Brothers Limited*, [1982] OLRB Rep. March 357, a case involving facts which are not materially different from the facts of the instant case. In doing so, the Board wrote, in part, as follows:

17. The argument that bargaining rights have been abandoned requires consideration, bearing in mind the system of centralized collective bargaining that has been in place, initially, under a system of accreditation and subsequently under a system of provincial collective agreements which are negotiated between an employer bargaining agency and an employee bargaining agency....

The respondent states that it is arguing the abandonment of bargaining rights. In the Board's jurisprudence the abandonment of bargaining rights has invariably been raised either where there is clearly no collective agreement or where there is a dispute as to whether a collective agreement is in effect through a process whereby a collective agreement has renewed itself due to a failure to give timely notice under the terms of a collective agreement. In subsequent paragraphs, the Board will trace the continuation of the bargaining relationship and the series of col-

lective agreements which came into effect and which were binding on the applicant and the respondent.

18. While the respondent states that it is arguing the abandonment of bargaining rights, in our view, such an argument is not tenable. The Board characterizes the argument of the respondent as the abandonment of collective agreements, which unknown to the applicant, the respondent, Local 47, and the [Ontario Sheet Metal and Air Handling] Group were applicable to them at various times and places. These collective agreements came into effect and were applicable to employers and trade unions beyond the immediate parties to the collective agreements by virtue of provisions of a public statute known as the *Labour Relations Act*. The application of these collective agreements under the provisions of the *Labour Relations Act* to the applicant, the respondent, Local 47 and the Group arose independently of their awareness by virtue of the operation of law. In these circumstances, the Board is not prepared to find that there has been an abandonment of bargaining rights or collective agreements.

We respectfully agree with that reasoning, and find it to be equally applicable in the circumstances of the instant case.

23. For the foregoing reasons, we find that the Union has not abandoned its bargaining rights in respect of the respondent's employees in the ICI sector.

24. The matter is referred to the Registrar to be listed for hearing on the merits, in consultation with the parties.

25. This panel of the Board is not seized.

1354-87-R Local 353 of the International Brotherhood of Electrical Workers, Applicant v. **M.L.S. Cable Installations Inc.**, Respondent v. Group of Employees, Objectors

Union Successor Status - Transaction constituting a transfer of jurisdiction - Issue of whether employer swept into an ICI provincial agreement to which successor but not predecessor local is a party not relevant to legal question of whether a transfer has occurred - Quality of union representation not relevant - Inappropriate for Board to define specifically the bargaining rights acquired

BEFORE: *Patricia Hughes*, Vice-Chair, and Board Members *R. W. Pirrie* and *D. A. Patterson*.

APPEARANCES: *Bernard Fishbein*, *D. Lounds*, *J. Fashion* and *R. Riopel* for the applicant; *J. Tascona* and *L. Ciaralli* for the respondent; *Sergio Rea* and *Mark Rocco* for the objectors.

DECISION OF THE BOARD; November 20, 1987

1. The name of the respondent is hereby amended to read: "M.L.S. Cable Installations Inc.".

2. Local 353 of the International Brotherhood of Electrical Workers ("IBEW") ("Local 353") seeks a declaration from the Board that it is a successor to Local 636 of the International

Brotherhood of Electrical Workers ("Local 636") with respect to all employees of M.L.S. Cable Installations Inc. ("the employer" or "M.L.S. Cable").

3. The relevant section of the *Labour Relations Act* ("the Act") reads as follows:

62.-(1) Where a trade union claims that by reason of a merger or amalgamation or a transfer of jurisdiction it is the successor of a trade union that at the time of the merger, amalgamation or transfer of jurisdiction was the bargaining agent of a unit of employees of an employer and any question arises in respect of its rights to act as the successor, the Board, in any proceeding before it or on the application of any person or trade union concerned, may declare that the successor has or has not, as the case may be, acquired the rights, privileges and duties under this Act of its predecessor, or the Board may dismiss the application.

(2) Before issuing a declaration under subsection (1), the Board may make such inquiry, require the production of such evidence or hold such representation votes as it considers appropriate.

(3) Where the Board makes an affirmative declaration under subsection (1), the successor shall for the purposes of this Act be conclusively presumed to have acquired the rights, privileges and duties of its predecessor, whether under a collective agreement or otherwise, and the employer, the successor and the employees concerned shall recognize such status in all respects.

4. The employer objects to our granting a declaration under section 62 of the Act. In its reply, it submitted that Local 353 is trying to circumvent other more appropriate procedures under the Act through an application under section 62. Its concern is that Local 353 is attempting to bring the work now performed by Local 636 members within the purview of the provincial agreement in the ICI sector: Local 353 is subject to the provincial agreement; Local 636 is not. At the hearing, the employer also contended that the transaction affected between the two locals is not one falling within section 62. Alternatively, the employer asks that we issue a declaration describing the bargaining rights acquired by Local 353. Certain employees also object to our issuing a declaration; they complain that there has been no contract with the employer since April 1987, that they have been paying dues without representation, and that the ballots in the vote held to determine the employees' views on this matter were not counted in front of the employees.

5. After hearing evidence given by Donald E. Lounds, the international representative of the IBEW, of the procedure followed in transferring jurisdiction from Local 636 to Local 353, and considering the submissions of all the parties, we orally granted the declaration sought by Local 353, giving brief reasons for our decision.

6. The IBEW Constitution (Exhibit 1 in these proceedings), by which Locals 636 and 353 are governed (pursuant to Articles 1 and XVII of that Constitution), provides as follows in Article XV:

ARTICLE XV LOCAL UNION
CHAPTERS

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Sec. 2. The type of work and the territory or jurisdiction covered by a charter must be defined in approved local union bylaws. The I[n]ternational P[re]sident has the right and power to divide or change the territory or jurisdiction covered by any L[ocal] U[nion], or to take charge of and direct certain jobs or projects in or passing through any territory, when in the judgment of the I.P. such should be done.

Sec. 3. The I.P. has the right and the power to merge or amalgamate L.U.'s in any community or section where the facts, developments or conditions--in the judgment of the I.P.--warrants such action, also to decide the terms or details of any merger or amalgamation when the L.U.'s involved cannot or do not agree.

Sec. 4. When a L.U. does not--in the judgment of the I.P.--organize or protect the jurisdiction or territory awarded it, then its charter may be suspended or revoked by the I.P. and a new L.U. established, or the jurisdiction or territory awarded to another L.U. or L.U.'s.

Mr. Lounds testified that the International President had transferred the jurisdiction of telephone interconnect companies from Local 636 to Local 353. The Constitution does not require the agreement of either the locals or the employees to such a transfer. Nevertheless, notice of a special meeting (Exhibit 3 herein) was distributed to the employees of M.L.S. Cable through being posted by Rene Riopel, the assistant business manager of Local 636, the Local 636 stewards and the employer's officials. The notice indicated that the purpose of the meeting was "to fully explain a proposed merger of the members of Local 636 employed by M.L.S. into Local 353, IBEW, Toronto, Ontario". It stated that a secret vote would be held on the matter. The ballot (a sample ballot was admitted into evidence as Exhibit 7 to these proceedings) posed the following question: "Are you in favour of changing your IBEW membership to Local 353 Toronto, Ontario" and contained two check-off boxes, one marked "Yes" and one marked "No". The results of the vote were 31 Yes and 3 No. Mr. Lounds testified he counted the ballots at his office with no one else present. He stated at first that he did not know why he had done it that way; in cases involving the employees of other companies, he had counted in front of the employees. He also said, however, that the M.L.S. Cable meeting had been held downstairs in a restaurant and the majority of employees went upstairs to the bar after the meeting.

7. Counsel for the employer contends that the transaction between the two Locals is not a merger, amalgamation or transfer of jurisdiction within the meaning of section 62 of the Act. We agree with employer's counsel that this transaction constitutes neither a merger nor an amalgamation; however, we disagree that it is not a transfer of jurisdiction. Counsel referred us to *Municipal Tank Lines Limited*, [1973] OLRB Rep. June 363. In that case, General Truck Drivers' Union, Local 938 ("Local 938"), the applicant, sought a declaration that it had acquired the rights, privileges and duties of Canada Tank Limited Union ("CTLU") through a transfer of jurisdiction. The affected employees were given notice of a meeting at which the transfer of the jurisdiction by CTLU to Local 938 was to be discussed and a motion to that effect was to be made. The actual motion put and vote taken were, however, for affiliation with Locals 938 and 880 of the Teamsters. The Board held that an affiliation does not come within now section 62 of the Act, but went on to consider whether there was a transfer of jurisdiction within the meaning of section 62. In doing so, the Board referred to the definition in *Hydro-Electric Power Commission of Ontario* 57 CLLC ¶18,080: "A transfer of jurisdiction takes place when one parent body assigns control over one of its subordinate branches or lodges to another parent body". It found that the transaction before it did not conform to the definition since Local 938 had no local and the successors were two locals, not a parent body. If anything, the Board found the transaction "more akin to merger or amalgamation than a transfer of jurisdiction", since the latter would mean the absorption of Local 938 into the two locals of the Teamsters.

8. In *Hydro-Electric, supra*, the employees at Hydro had been "represented" by the Employees' Association of the Hydro-Electric Power Commission of Ontario ("the Association") which in 1955 became affiliated with the National Union of Public Service Employees ("NUPSE"). According to the Agreement of Understanding between the Association and NUPSE, the Association retained "complete autonomy to conduct its internal affairs as they [sic] deem necessary". The Ontario Labour Relations Board found subsequently that the Association was a trade union; the Association later changed its name to "The Ontario Hydro Employees' Union, National Union of Public Service Employees - C.L.C." ("Hydro Employees' Union"). The Board, in *Hydro-Electric, supra*, stated that it was clear that the Association had changed its name and had become associated with NUPSE and that the question before it was "has [the Association] become attached to [NUPSE] by reason of a merger, amalgamation or transfer of jurisdiction". The Board provided

definitions of all three terms, including the last as set out above, and found none applied to the transaction before it. With respect to the transfer of jurisdiction, the only term with which we are concerned here, the Board said that “[s]ince the applicant, before it established a connection with [NUPSE], was never a subordinate branch of a parent body, there could be no transfer of jurisdiction in this case” and that the “true nature” of the relationship between the Hydro Employees Union and NUPSE was “affiliation”. The Hydro Employees Union “retained its own identity in every essential respect”, including both internal and external affairs and that “[t]here is nothing in the constitution of the applicant itself which concedes to or confers upon [NUPSE] any control over the applicant whatsoever”. The Hydro Employees Union remained the same legal entity as the Association. The Board applied the *Hydro-Electric* case in *Consolidated Glass Industries Limited*, 62 CLLC ¶16,220. The International Chemical Workers Union (“ICWU”) sought a declaration that it was the successor of the Canadian Glassworkers Union (“the Glassworkers”). The Glassworkers continued to exist as a trade union, had not transferred any jurisdiction to the ICWU and stated that there would be no action to effect a merger, amalgamation or transfer of jurisdiction until the Board had made a determination on the successor status of the ICWU. The Board relied on the principles set out in *Hydro-Electric*, *supra*, holding that since the Glassworkers was never a subordinate branch of a parent body, there could be no transfer of jurisdiction. (It would not issue a declaration with respect to a merger or amalgamation because a completed merger or amalgamation is a precondition to a declaration. Presumably, the same would be true of a transfer of jurisdiction.)

9. Counsel for Locals 353 and 636 maintains that the Board has held there to be a transfer of jurisdiction in cases not conforming to the definition set out in *Hydro-Electric*, *supra*. In *Canada Wire and Cable Company Limited*, [1962] OLRB Rep. Jan. 365, the Board found that the jurisdiction of the Simcoe General Workers Union, Local 1587 (CLC) had been transferred to the United Steelworkers of America by the parent of the local, the Canadian Labour Congress. This appears to conform to the *Hydro-Electric* definition. The Board in *The Hydro-Electric Commission of the City of Hamilton*, 63 CLLC ¶16,261 held that the International Brotherhood of Electrical Workers, Local No. 138 (“Local 138”) was the successor of the International Brotherhood of Electrical Workers, AFL, CIO, CLC (“IBEW”) by virtue of a transfer of jurisdiction over the office employees of the Hydro-Electric Commission of Hamilton from the IBEW to its own local, Local 138. It found that Local 138 had accepted jurisdiction over the office workers. The Board did not refer to the *Hydro-Electric* definition and this transaction does not appear to conform to the definition: the Board did not find that “one parent body had assigned control over one of its subordinate branches to another parent body”. Counsel points out that the decision in *National Concrete Products Limited*, [1967] OLRB Rep. Nov. 780 makes no reference to *Hydro-Electric*, *supra*. In that case, the rights, privileges and duties of the United Glass & Ceramic Workers of North America, AFL-CIO-CLC (“the Glass & Ceramic Workers”) had been transferred six years previously to the Canadian Labour Congress (“C.L.C.”), the Glass & Ceramic Workers now sought the return of those rights, duties and privileges from Local 1596 of the CLC. The Board held that the Glass & Ceramic Workers “by reason of a merger or amalgamation or transfer of jurisdiction” was a successor to Local 1596 of the CLC. The Board did not determine which form the transaction had taken; on the other hand, it can be said that the transfer from a local of one parent body of the rights, privileges and duties to another parent body was not found not to be a transfer of jurisdiction, even though it did not appear to involve the assignment of control of a local (that is Local 1596) by its parent (the CLC) to another parent body (the Glass & Ceramic Workers). In sum, one of these cases has explicitly rejected the definition of a transfer of jurisdiction as set out in the *Hydro-Electric* case, *supra*; some have followed it; others have avoided it.

10. The Board in the *Hydro-Electric* case, *supra*, did not explain why it restricted the term “transfer of jurisdiction” in the manner it did. Nor has the Board done so in the cases purporting

to apply *Hydro-Electric, supra*, to which we were referred. Counsel for the employer relied on *Municipal Tank Lines Limited, supra*, without indicating the labour relations purpose for our doing so. In *Waterloo Spinning Mills Ltd.*, [1984] OLRB Rep. March 542, the Board had to determine whether a merger had occurred; it indicated at paragraph 38 that it did not think “anything turns on the fact that the transaction with the UFCW [the applicant] was framed as a merger rather than a transfer of bargaining jurisdiction” and later stated, at paragraph 45 that [u]nder section 62 of the *Labour Relations Act*, the Board must assess a *claim* that one trade union is the successor of another by reason of a merger, amalgamation, or transfer of bargaining jurisdiction” (emphasis in original). In our view, this terminology, with the addition of the word “bargaining” in the phrase “transfer of jurisdiction” reflects the purpose of section 62 and the nature of that transaction termed “transfer of jurisdiction”. We agree with counsel for Locals 353 and 636 that the purpose of the section is to give effect to a transfer of bargaining rights.

11. In this case, Local 636 held bargaining rights for employees of M.L.D. Cable working as installers and dispatchers. There had been disputes over whether members of Local 353 and Local 636 were entitled to perform certain work, specifically the installation of conduit and the pulling of cable through that conduit. It was agreed among representatives of Local 353, Local 636 and the International that the way to resolve the disputes was to have all work covered by one local, Local 353. By letter dated May 28, 1987, J.J. Barry, International President, wrote to K.G. Rose, International Vice-President, with respect to the by-laws of Local 353, informing him that “Article 1, Sections 1 and 3 and Article X, sections 3(a) and 6(a) have been amended by adding Communication and Telephone Interconnect jurisdiction” Mr. Lounds agreed that the transaction consisted of a transfer of communications from Local 636 to Local 353 and that Local 636 continues to exist, primarily with respect to the utilities jurisdiction, but also with respect to communications work performed by employees of employers not named in Article 1 of Local 353 By-laws. In *Canada Wire and Cable, supra*, the Board held that “it is not a condition precedent to a transfer of jurisdiction that the transferor union cease to exist or that its Charter be cancelled”.

12. We are satisfied that there has been a transfer of jurisdiction within the meaning of section 62 of the Act.

13. We are further satisfied that the only question we have to determine under section 62 is whether there has been (in this case) a properly enacted transfer of jurisdiction. It is not our responsibility under section 62 to determine the effect of the transfer of jurisdiction on the bargaining relationship between the employer and the union involved. The employer is concerned that it might be swept into the ICI provincial agreement to which Local 353, but not Local 636, is a party. This was also the concern of the employer in *Deseronto Public Utilities Commission*, [1977] OLRB Rep. April 248; there the Board said the following:

5. The matters raised by the respondent are clearly of real concern to it. At the hearing the representative of the applicant sought to address himself to these concerns. The Board's position in all this, however, is merely to ensure that a claimed merger, amalgamation or transfer of jurisdiction has in fact occurred, and it has to then declare what results have flowed from the merger, amalgamation or transfer of jurisdiction. This in turn requires that the Board scrutinize the procedures adopted by the trade unions concerned, with particular emphasis on the procedures adopted by the predecessor trade union, so as to ensure that those procedures conform with the union's constitution (in this case the constitution of the International Brotherhood of Electrical Workers) as well as the law as it has developed in relation to union mergers and amalgamations. (A discussion of certain aspects of the law in this regard is set out in the Board's decision in the *Brewer's Warehousing Company Limited* case, [1974] OLRB Rep. July 461.) Issues such as those raised by the respondent are not relevant to the legal question as to whether or not a purported merger, amalgamation or transfer of jurisdiction has in fact been properly carried out. Further, we are of the view that once the Board is satisfied that a merger, amalgamation or transfer of jurisdiction has been effected, it would be contrary to the purpose and intent of sec-

tion 54 for the Board to refrain from making a declaration to that effect on the basis of the respondent's concerns. This is not to say that certain aspects of the bargaining relationship between the parties may not undergo change. However the law does recognize that union mergers, amalgamations and transfers of jurisdiction may occur such that a successor union may replace or substitute for a predecessor union in a bargaining relationship with an employer. Necessarily following from this is the fact that an employer may find itself in a bargaining relationship with a union different from that it is accustomed to dealing with, and that this "new" union may possibly adopt policies and procedures different from that of its predecessor.

14. Similarly, the objections raised by the employees are not bars to the Board's granting a successor rights declaration where the Board's requirements are otherwise satisfied. It is not for the Board to determine in a section 62 application whether the employees have received adequate representation by the applicant. We note too, that the employees have not raised any allegations about any voting impropriety which might require another vote, although we make no determination about whether another vote would be required had any such allegation been made and substantiated.

15. The Board has said that "the wishes of affected employees are always a relevant concern on an application under section 62" and that "the approval of affected employees [is] required in addition to approval of the trade unions involved": *L.M.L. Foods Inc.*, [1985] OLRB Rep. Aug. 1252, at paragraph 33. However, in *Zehrs Markets*, [1977] OLRB Rep. Oct. 637, the Board stated at paragraph 13 that the Board is concerned only that "either the constitutional provisions of the predecessor trade union regarding a merger, amalgamation or transfer of jurisdiction have been followed ..., or, if there are no such constitutional provisions, that there has been unanimous approval of the change by the union membership ..." (Also see *Jaeger Machine Company of Canada Ltd.*, [1983] OLRB Rep. July 1082 and *Trans Nations Incorporated*, [1981] OLRB Rep. Sept. 1298.) We are not required in this case to join the debate about the procedures to be followed before a declaration can be made by the Board. The IBEW's constitutional requirements were satisfied; since there is provision for a transfer of jurisdiction in the Constitution, the requirement that unanimous approval be obtained does not apply, but notice was given and a vote taken, with a majority voting in favour of Local 353. We are satisfied that both the notice and the wording on the ballot, even if not referring to a transfer of jurisdiction, effectively informed the employees and that they knew the nature of the question before them. Thus any requirements additional to those set out in the Constitution which *might* be required were satisfied.

16. The employer has asked in the alternative for a declaration setting out exactly the rights, privileges and obligations acquired by Local 353 in the transfer. Section 62 makes it clear that the successor union acquires only those rights, privileges and obligations which were enjoyed by and required of its predecessor. As the Board pointed out in *Deseronto Public Utilities*, *supra*,

6. We feel it is worth stressing at this point that a declaration under section [62] has no greater effect than to substitute one union for another in a bargaining relationship. The bargaining rights and privileges possessed by the successor union are no greater than, or different from, the rights and privileges formerly possessed by the predecessor union.

Thus Local 353 can acquire *through a successor rights declaration* only the rights, privileges and obligations of Local 636. Under subsection 145(4) of the Act, the employer becomes bound by the provincial agreement only where an affiliated bargaining agent obtains bargaining rights through certification or voluntary recognition. The consequences resulting from an affiliated bargaining agent's being declared a successor to a union not designated as such must be dealt with through other proceedings should the issue arise. Thus we are of the view that it is inappropriate for us to define specifically the bargaining rights acquired by Local 353 with respect to the employees of

M.L.S. Cable previously represented by Local 636, even if we had the necessary evidence before us to make such a determination.

17. Accordingly, we are satisfied that there has been a proper transfer of jurisdiction and that Local 353 has acquired the rights, privileges and obligations under the Act of the predecessor Local 636.

1782-87-R United Steelworkers of America, Applicant v. The Corporation of the Township of Michipicoten, Respondent v. William A. Lamon, Objector

Certification - Collective Agreement - Whether documents to which respondent bound considered to be collective agreements thereby making application untimely - Employees of respondent not constituting an organization of employees and therefore document containing terms and conditions of employment not a collective agreement - Certificate issuing

BEFORE: *Ken Petryshen*, Vice-Chair, and Board Members *D. A. MacDonald* and *C. A. Ballentine*.

APPEARANCES: *Brian Shell*, *Steve Bonifero* and *Andy Lavoie* for the applicant; *Yvon Renaud* on October 30, *Paul Young* on November 19, *W. D'Arcy Halligan* and *Harry McCluskie* for the respondent; *William A. Lamon* for the objector.

DECISION OF THE BOARD; November 27, 1987

1. The name of the respondent is amended to read: "The Corporation of the Township of Michipicoten".

2. This is an application for certification.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

4. When the Board addressed the issue of the bargaining unit description on the first scheduled day of hearing, counsel for the applicant sought to amend the bargaining unit description in order to reflect more accurately the unit of employees the applicant wished to represent. The applicant applied for a unit described as all employees of the respondent in the public works department with certain exceptions and this description was set out in the Form 6 Notice to Employees. At the hearing, the applicant wished to amend the bargaining unit description so as to cover all outside employees of the respondent with certain exceptions. The Board was prepared to permit the applicant to amend its proposed bargaining unit description at the hearing for two reasons. The applicant had been of the view when it initially applied for certification that all of the "outside" employees of the respondent worked in the public works department. Secondly, the amended bargaining unit description is more consistent with the Board's practice in describing municipal bargaining units.

5. Having granted the applicant's amendment to the bargaining unit description, the Board entertained submissions from the parties concerning whether there was now a notice prob-

lem. After recessing to consider the parties' submissions on this point, the Board orally ruled at the hearing that it would direct the Registrar to extend the terminal date and to cause an amended Form 6 Notice to Employees to be sent to the respondent for posting. The Board was satisfied that the amended bargaining unit description would include within it some employees of the respondent who might not reasonably conclude from reading the Form 6 as posted that they would be included in a bargaining unit described as all employees in the public works department.

6. In its reply and at the hearing, the respondent took the position that this application ought to be dismissed since the respondent is a party to two documents which it argued are collective agreements. One of the documents pertained to the employees of the public works department and the other covered another grouping of outside employees. If the documents are collective agreements, this application would be untimely. Normally when confronted with a notice problem, the Board would be unable to proceed further with the case. But since the employees in the public works department had received adequate notice and since the employee who signed the document on behalf of the public works department employees was at the hearing and willing to proceed, the parties agreed to address the issue of a collective agreement bar insofar as the public works department document was concerned. Counsel for the respondent advised us that if the Board found the public works department document was not a collective agreement, the respondent would not continue to rely on the second document as a bar.

7. It was unnecessary to hear evidence on the issue of a collective agreement bar. Counsel for the respondent set out the facts upon which he relied in support of the respondent's position. Counsel for the applicant referred to a few additional facts which in his view were relevant to the issue. There was no dispute between the parties with respect to the facts set out by each counsel. After entertaining the parties' submissions and after recessing to consider the matter, the Board orally ruled at the hearing on October 30, 1987 that the document relied upon by the respondent as a bar to this application was not a collective agreement within the meaning of section 1(1)(e) of the Act and, therefore, did not constitute a bar to this application.

8. The document in issue is an agreement between the respondent and the permanent employees of the public works department of the Township of Michipicoten. The document has clauses dealing with hours of work, vacations, sick leave, wages and benefits, seniority and grievances. The document's terms were negotiated by representatives of the respondent and employee representatives. This process has existed for over twenty years. Employees have utilized the grievance procedure and the respondent did not interfere with the employees while the document was being negotiated or during the term of the document.

9. The employees of the public works department have not formed an entity in any formal sense. The Board is satisfied that the grouping of employees in the public works department does not have a constitution by which it governs its affairs.

10. In essence, section 1(1)(e) of the Act defines a collective agreement as a document in writing between an employer and a trade union. A trade union is defined in the Act as an organization of employees formed for certain purposes. In considering the document relied on by the respondent, the Board has to decide whether the permanent employees of the public works department constitutes an organization of employees. In *Associated Hebrew Schools of Toronto*, [1978] OLRB Rep. Sept. 797, the Board reviews the necessary elements of an organization of employees:

9. Section 1(1)(n) [now (p)] of the *Labour Relations Act* defines a trade union, in part, as an organization of employees formed for purposes that include the regulation of relations between employees and employers... Such an organization is entitled, if it otherwise qualifies, to be certified, to negotiate collective agreements and generally to exercise the rights of a trade union

under the Act. The Board, in seeking to determine whether an applicant before it is a trade union, required that it be more than just an informal joining together of individuals. Instead, the Board requires that the applicant be a formal organization whose members have bound themselves together on the basis of specific terms for purposes that include the regulation of relations between employees and employers. The decision of the Supreme Court of Canada in *Orchard v. Tunny* (1957) 8 D.L.R. (2d) 273 and the Ontario Court of Appeal in *Astgen v. Smith* (1967) 7 D.L.R. (3d) 657 indicate that the essence of a trade union is a group of individuals who have entered into a contractual relationship one with the other, the terms and conditions of which are provided by the union's constitution. In *Orchard v. Tunny*, Rand J. in delivering the majority decision of the Court stated at p. 281:

Apart then, from statute, that a union is held together by contractual bonds seems obvious, each member commits himself to a group on a foundation of specific terms governing individual and collective action ... and made on both sides with the intent that their rules shall bind them in their relations to each other. That means that each is bound to all the others jointly.

In *Astgen v. Smith*, Mr. Justice Evans in giving the majority decision of the court made the following statements concerning the International Union of Mine, Mill and Smelter Workers at p. 662:

Mine Mill is not a corporation, individual or partnership, and is accordingly not a legal entity; it is an unincorporated group or association of workmen who have banded together to promote certain objectives for their mutual benefit and advantage and in law nothing is recognizable other than the totality of members related one to another by contract. The objects and purposes of the association are spelt out in the memorandum of association usually referred to as the 'constitution', the by-laws or rules provide the machinery for the proper carrying out of activities intended to advance the objectives and purposes of the voluntary association. Each member of Mine Mill, upon being granted membership, subscribed to those purposes and objects and in so doing entered into a contractual relationship with every other member of Mine Mill.

I adopt also the proposition stated by Thomson J. in *Bimson v. Johnson et al* [1957] O.R. 519 at p. 530, 10 D.L.R. (2d) 11 at p. 22, which was affirmed on appeal [1968] O.W.N. 217, 12 D.L.R. (2d) 379: "... that a contract is made by a member when he joins the union, the terms and conditions of which are provided by the union's constitution and by-laws... The contract is not a contract with the union or association as such, which is devoid of power to contract, but rather the contractual rights of a member are with all other members thereof".

10. Once a trade union has come into existence it is a relatively simple matter for others to become members of the organization and thereby enter into a contractual relationship with the existing members. When a new member joins, however, he does so on the basis of a pre-existing constitution. He knows (or at least should know) that it is a trade union which he is joining, that he is entering into a contractual relationship with the other members of the union and that the terms of that relationship are as spelt out in the union's constitution. The more difficult procedure to accomplish is for a group of employees to create a trade union where none has existed before. This process must involve not only the settlement of the terms of a constitution for the union, but also the taking of steps which make it clear that the individuals involved have actually entered into a contractual relationship one with another on the basis of the terms set forth in the constitution.

11. In arriving at its decision of October 30, 1987, the Board was satisfied that the respondent was party to an agreement with a grouping of employees but not a trade union. The permanent employees of the public works department cannot be considered an organization of employees since it is not a formal organization in the sense of having a constitution and officers. See *Parkdale Wines Limited*, [1970] OLRB Rep. July 485; *National Standard Company of Canada, Limited*, [1974] OLRB Rep. Oct. 704.

12. The hearing in the matter continued on November 19, 1987. The Board did not receive any additional representations from employees as a result of the posting of the amended Form 6 Notice to Employees.

13. Having regard to the agreement of the parties, the Board finds that all employees of the respondent in the Township of Michipicoten, save and except foremen, persons above the rank of foreman, office staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, constitute a unit of employees appropriate for collective bargaining.

Clarity Note: For purposes of clarity, the bargaining unit description excludes persons engaged in aeronautics at the airport.

14. After the union and Mr. Lamon, the objecting employee, reviewed the lists of employees filed by the respondent, Lamon took the position that he should be excluded from the bargaining unit since he exercised managerial functions. Lamon advised the Board with respect to those job functions he performed which in his view were of a managerial nature. Lamon is classified as a mechanic leader. In this position, he orders stock and performs what he describes as public relations duties. He decides which equipment repair job will be given priority and he is involved in truck and equipment training for new employees. After giving all of the parties the opportunity to speak to this issue and after recessing to consider the matter, the Board orally ruled at the hearing that Mr. Lamon did not exercise managerial functions within the meaning of section 1(3)(b) of the Act.

15. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on November 12, 1987, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

16. A certificate will issue to the applicant.

1743-87-R Jean Minor, Applicant v. United Food & Commercial Workers Local 175, Respondent v. Robin Hood Multifoods Inc. Glassgoods Division, Intervener

Termination - Timeliness - Termination application untimely - Dismissal for untimeliness not a bar to a subsequent application

BEFORE: *Patricia Hughes*, Vice-Chair, and Board Members *G. O. Shamanski* and *J. Sarra*.

APPEARANCES: *Jean Minor*, *Claudia Robins*, *Elena Di Carmine* and *Angela Crognale* for the applicant; *Dave Watson* and *Wayne Hanley* for the respondent; *Heather J. Laing* for the intervenor.

DECISION OF THE BOARD; November 25, 1987

1. This is an application for a declaration that the United Food and Commercial Workers, Local 175 no longer represents the employees of Robin Hood Multifoods Inc. Glassgoods Division

in the bargaining unit for which it is the bargaining agent, pursuant to section 57 of the *Labour Relations Act* ("the Act").

2. The application was filed on September 24, 1987. The collective agreement expires November 30, 1987. The applicant concedes it is untimely but says she sent it "prematurely" because she was concerned it would get lost in the mail. She seeks to withdraw the application. In an oral decision, we dismissed this application.

3. The applicant believes that if the application is dismissed, she would not be permitted to file another application. Dismissal because the application is untimely does not result in a bar to a subsequent application. In this case, we have made no adjudication on the merits and the sole basis for our dismissing this application is because it was not filed in a timely manner in accordance with the requirements of subsection 57(2) of the Act.

1836-87-G International Union of Operating Engineers, Local 793, Applicant v. Runnymede Development Corporation Ltd., Respondent

Construction Industry Grievance - Prohibition in collective agreement from using non-union sub-contractors - Prohibition postponed until later date - Whether collective agreement prohibiting the use of such contracting as of that date regardless of when the sub-contracting arrangements were entered into or whether only restricting the respondent from entering into new sub-contracting arrangements after that date - Intention was that as of that date all non-union contracting work would cease - Violation of collective agreement

BEFORE: *Judith McCormack*, Vice-Chair, and Board Members *J. Sarra* and *J. F. Davidson*.

DECISION OF THE BOARD; November 5, 1987

1. This is a referral of the grievance to arbitration pursuant to section 124 of the *Labour Relations Act*.

2. The parties were in agreement that the applicant and the respondent were bound to a collective agreement effective November 1, 1986 and running until April 30, 1988. That collective agreement contains the following clause:

2.7 The Employer shall engage only those sub-contractors (or equipment from these sub-contractors) who are in contractual relations with the Union to perform work covered in this Agreement. This provision becomes effective on August 1, 1987.

The last sentence has been added in handwriting and initialled by the parties. It was apparent from the evidence that this clause represents a compromise between the immediate prohibition preferred by the applicant and an even longer postponement of the operation of the clause which the respondent desired.

3. The grievance concerns the sub-contracting of the earthworks at the respondent's residential construction project at Applecroft Village South, which includes four distinct areas. In May of 1987, the respondent sub-contracted the earthworks for phases 1, 2 and 3 of the project to Val-leau Construction Inc. or Valleau Construction Limited ("Valleau"). Valleau commenced work in

the middle of May, although a written contract in this regard between the respondent and Valleau was not executed until sometime in August of 1987. Valleau and the respondent had agreed that the work was to be done within a certain time period, and in fact the work was completed on phases 1, 2 and 3 by mid-July, 1987. While work was proceeding on phases 1, 2 and 3, the respondent was attempting to obtain the appropriate engineering, design and municipal approvals for phase 4. During this time, there were some discussions between Valleau and the respondent with respect to Valleau doing the earthworks for phase 4 as well. However, work on phase 4 itself (as distinct from work on phases 1, 2 and 3 which incidentally affected the phase 4 area) did not really commence until mid-August of 1987.

4. The dispute between the parties centered on whether article 2.7 prohibited the use of contractors described as of August 1, 1987, regardless of whether the sub-contracting arrangements were entered into prior to August 1, 1987, or whether it merely restricted the respondent from entering into new sub-contracting arrangements after that date. In addition, there was a dispute with respect to whether it could be said that the work with respect to phase 4 was sub-contracted before or after August 1, 1987.

5. The Board delivered the following oral decision at the hearing:

After carefully considering the parties' evidence and submissions, we conclude that the sub-contracting of the work with respect to phase 4 of the Applecroft Village South project to Valleau was a violation of article 2.7 of the collective agreement between the applicant and the respondent. It is evident on the material before us that article 2.7 was originally intended to prohibit entirely the use of sub-contractors who were not in contractual relations with the applicant. As is apparent on the face of the collective agreement and from the evidence of Mr. Greenbaum, the respondent was successful in getting agreement on a grace period so that article 2.7 would become effective only as of August 1, 1987. In other words, the prohibition on the use of the sub-contractors in question was postponed until that date. But as of that date, we find, the intention of the article was that all non-union contracting work as described would cease. We find some confirmation for this interpretation by the respondent's conduct in arranging for Valleau's work on phases 1, 2 and 3 to be completed prior to August 1, 1987. While the language of article 2.7 is somewhat ambiguous in isolation, when reviewed in the context of both construction industry labour relations and the circumstances of this case, we find the applicant's interpretation to be more cogent than the respondent's. In arriving at this conclusion, we are cognizant of the purpose that this kind of clause serves in this sector in terms of protecting the job security of employees.

In any event, it is our view that the arrangements made with respect to the phase 4 work prior to August 1, 1987 were so tenuous and conditional that it could not be said on any party's interpretation of article 2.7 that Valleau had been engaged by the respondent prior to August 1st. For all these reasons we find that the respondent violated article 2.7 by sub-contracting phase 4 to Valleau.

We remain seized with respect to remedy. We note that in arriving at our decision, we accepted the evidence of Wayne Valleau that all work by Valleau on phases 1, 2 and 3 was completed before August 1, 1987.

0700-87-R; 0731-87-R; 0736-87-R Ontario Secondary School Teachers' Federation, Applicant v. **The Sault Ste. Marie Board of Education**, Respondent; Ontario Secondary School Teachers' Federation, Applicant v. **North York Board of Education**, Respondent; Ontario Secondary School Teachers' Federation, Applicant v. **Wellington County Board of Education**, Respondent

Bargaining Unit - Certification - Pre-Hearing Vote - School Boards and Teachers Collective Negotiations Act - "Bill 100 teacher" and "occasional teacher" not always mutually exclusive categories - Board determining appropriate exclusionary language for occasional teacher bargaining unit - Board declining to set aside vote on basis of inadequate notice of vote, inadequate information on the benefits of collective bargaining or low voter turnout - Certificates issuing

BEFORE: Owen V. Gray, Vice-Chair, and Board Members G. O. Shamanski and J. Redshaw.

DECISION OF THE BOARD; November 20, 1987

1. These are three certification applications affecting occasional teachers in the respondents' secondary panels. Pre-hearing representation votes have been conducted in each application, as directed by earlier decisions ("the pre-vote decisions") dated July 16, 1987 (in Board File No. 0731-87-R, "the North York application") and July 23, 1987 (in Board Files 0700-87-R, "the Sault Ste. Marie application", and 0736-87-R, "the Wellington application"). Notice of the Report of Returning Officer has been given in each case. Written submissions have been filed by the applicant and each of the respondents and by an employee affected by the North York application. None of those submissions contains a request that a hearing be conducted. Accordingly, the outstanding issues in each application will be disposed of without a hearing pursuant to subsection 70(5) of the Board's Rules of Procedure. Our decisions in these applications are consolidated because they share a common issue: how to describe the bargaining unit.

2. We find that the applicant is a trade union within the meaning of clause 1(1)(p) of the *Labour Relations Act*.

3. In each of these applications, the applicant and respondent were initially in agreement that the appropriate bargaining unit, and hence the voting constituency for the purpose of any pre-hearing representation vote, should be described as follows:

all occasional teachers employed by the respondent in its secondary panel in [geographic area], save and except employees in bargaining units for which any trade union held bargaining rights as of [the application date].

While observing that the proper description of the appropriate bargaining unit was not a matter to be decided at that stage, in each of the pre-vote decisions in these applications the Board noted the observations in *The Board of Education for the City of Hamilton*, [1987] OLRB Rep. June 847, at paragraphs 11 and 12:

11. ...While the parties have agreed that the bargaining unit description should include the words "save and except employees in bargaining units for which any trade union held bargaining rights as of May 19, 1987" (the application date), the panel which ultimately disposes of that issue may wish to consider the propriety of including those words. It is true that, to date, such words have almost invariably been included in the description of occasional teacher bargaining units, as the Board noted in *Carleton Roman Catholic Separate School Board*, [1987] OLRB Rep. Jan. 18 at paragraph 19:

The customary description of an occasional teacher bargaining unit expressly excludes "employees in bargaining units for which any trade union held bargaining rights as of [the application date.]" That language was originally adopted to satisfy concerns that school boards had about making distinctions between occasional teachers and teachers covered by Bill 100. Strictly speaking, this exclusionary language is unnecessary for that purpose, since "occasional teachers" are not "teachers" as that term is currently defined in Bill 100.

The Board went on in that paragraph to note that:

It is important to remember, however, that that exclusion (whether by express language or by operation of Bill 100 and subparagraph 2(f) of the *Labour Relations Act*) only applies to a teacher in respect of employment which falls within the scope of Bill 100. In respect of employment to teach as a substitute for a permanent, probationary or temporary teacher in the circumstances described in clause 1(1)31 of the *Education Act*, a teacher is an occasional teacher and falls within the customary occasional teacher bargaining unit description even if, during other hours of the week, he or she is engaged by the same school board in employment which falls within the scope of Bill 100.

Having regard to the way in which the issues developed in that particular case, it may be that the addition of the words in question is not only unnecessary but also potentially misleading to those who may not understand the point made in the latter half of the paragraph just quoted. Because of this possibility of misunderstanding, the Board may wish to reconsider its current practice.

12. There is no suggestion that occasional teachers employed as such by the respondent fell within any bargaining unit for which a trade union held bargaining rights as of the date of this application. If any of the parties wishes the Board to include the words "save and except employees in bargaining units for which any trade union held bargaining rights as of May 19, 1987" in the final bargaining unit description, they should include their representations in support of that request in the statement of desire they file after receiving notice of the Returning Officer's report on the conduct of the vote. If no such representations are received by the Board, it will be assumed that this request has been abandoned by the parties.

Each of the pre-vote decisions adopted these observations and added that any post-vote representations on this subject should indicate whether the party making them was of the view that any occasional teacher *as such* fell within a bargaining unit for which a trade union held bargaining rights on the application date. The respondents (who are all represented by the same counsel) and the applicant have addressed this issue in their post-vote representations. Before addressing those representations, we should set out the relevant statutory definitions.

4. Subsection 1(1) of *The Education Act*, R.S.O. 1980, c.129, as amended, provides that:

31. "occasional teacher" means a teacher employed to teach as a substitute for a permanent, probationary or temporary teacher who has died during the school year or who is absent from his regular duties for a temporary period that is less than a school year and that does not extend beyond the end of a school year;
66. "teacher" means a person who holds a valid certificate of qualification or a letter of standing as a teacher in an elementary or a secondary school in Ontario;
35. "permanent teacher" means a teacher employed by a board under a permanent teacher's contract made in accordance with the regulations and includes a teacher whose contract is deemed to include the terms and conditions contained in the form of contract prescribed in the regulations for a permanent teacher;
41. "probationary teacher" means a teacher employed by a board under a probationary teacher's contract made in accordance with the regulations;

- 67. "temporary teacher" means a person employed to teach under the authority of a letter of permission;
- 33. "part-time teacher" means a teacher employed by a board on a regular basis for other than full-time duty.

Section 230 of the *Education Act* provides:

230.-(1) A full-time or part-time teacher who is employed by a board and who is not an occasional teacher shall be employed as a permanent or a probationary teacher.

(2) A memorandum of every contract of employment between a board and a permanent teacher or a probationary teacher shall be made in writing in the form of contract prescribed by the regulations, signed by the parties, sealed with the seal of the board and executed before the teacher enters upon his duties, but if for any reason such memorandum is not so made, or has not been amended to incorporate any change made in the form of contract so prescribed, every contract shall be deemed to include the terms and conditions contained in the form of contract prescribed for a permanent teacher.

Thus, the *Education Act* contemplates three sorts of "teacher": "permanent teacher", "probationary teacher" and "occasional teacher";. (A "temporary teacher" is not a "teacher"; these are treacherous semantic waters for those who expect words to have either ordinary or consistent meanings.) Unless a "teacher" is an "occasional teacher", he or she is either employed or deemed to be employed under a contract in the form prescribed by the regulations under the Act": see *Board of Education for the City of York*, [1984] OLRB Rep. Sept. 1279, application for judicial review dismissed sub. nom *Re Ontario Secondary School Teachers' Federation, District 14 and Board of Education of Borough of York and two other applications* (1987), 58 O.R. (2d) 375, 35 D.L.R. (4th) 588 (Ont. Div. Ct.). In the lexicon of school board employment relations, a teacher employed under a contract in the form prescribed by the regulations under the *Education Act* is known as a "contract teacher".

5. Clause 1(1)(m) of the *School Boards and Teachers Collective Negotiations Act*, R.S.O. 1980, c.464 ("Bill 100"), provides that, for the purposes of that Act

- (m) "teacher" means a person,
 - (i) who holds a valid certificate of qualification as a teacher in an elementary or secondary school in Ontario,
 - (ii) who holds a letter of standing granted by the Minister under the *Education Act*,
 - (iii) in respect of whom the Minister has granted a letter of permission under the *Education Act*,

and who is employed by a board under a contract of employment as a teacher in the form of contract prescribed by the regulations under the *Education Act*, but does not include a supervisory officer as defined in the *Education Act*, an instructor in a teacher-training institution or a person employed to teach in a school for a period not exceeding one month.

Bill 100 governs labour relations between school boards and those contract teachers who fall within this definition ("Bill 100 teachers"). As a result, section 2 of the *Labour Relations Act* provides that

- 2. This Act does not apply,

- (f) to a teacher as defined in the *School Boards and Teachers Collective Negotiations Act*, except as provided in that Act.

6. The notion that “Bill 100 teacher” and “occasional teacher” are mutually exclusive categories appears in the first decision of the Board which dealt with an application for certification with respect to occasional teachers (*The Board of Education for the City of Toronto*, [1983] OLRB Rep. Feb. 273 at paragraph 4) and in *Board of Education for the City of York*, [1985] OLRB Rep. May 767:

5. It is common ground that the labour relations and collective bargaining of occasional teachers is regulated by the *Labour Relations Act*. They are not teachers as defined by Bill 100; hence they are not excluded by section 2(f) of the *Labour Relations Act* [see: section 230 of the *Education Act*, and section 1(1)(m) of Bill 100]. The result is that the occasionals fall under the *Labour Relations Act*, while those whom they replace are covered by Bill 100.

7. One of the issues in *Carleton Roman Catholic Separate School Board*, *supra*, was whether part-time contract teachers who supplemented their income from contract employment by seeking and performing occasional teacher assignments would be excluded from an occasional teacher bargaining unit when performing those assignments. The school board respondent in that case thought that those teachers should be excluded from the occasional teacher unit, even though when performing occasional teaching assignments they would not be covered by the collective agreement negotiated under Bill 100. Indeed, at one point in the proceedings that school board held and expressed the belief that that was the result of the then usual exclusionary language “save and except employees in bargaining units for which any trade union held bargaining rights”. The potential of that language to engender that belief is what prompted the concern expressed in the passage quoted in paragraph 3 above. It is certainly reason enough to apply the Board’s usual policy that non-existent groups should not be expressly excluded, and to require particulars of the existing bargaining units for which trade unions are said to hold bargaining rights.

8. Each of the respondents has a collective agreement with a branch affiliate of the applicant covering “teachers” (as defined by Bill 100) in its secondary schools. Each of those agreements addresses the problem of “surplus teachers”, which arises when the number of contract teachers employed by a school board exceeds the number of contract teachers needed in the following year. In each case, provision is made for some teachers whose contracts would otherwise be terminated to remain employed *on contract* in what one of the agreements describes as a “surplus pool of contracted teachers”. Teachers in these pools are assigned to act as replacements for absent contract teachers. They would be used for that purpose before such use is made of teachers who are not under contract. Indeed, one of the agreements describes these contract teachers as “priority occasional teachers”.

9. The respondents offer the existence of these categories of contract teacher as justifying the use in the bargaining unit description of the exclusionary language originally agreed to by the parties. Implicit in that is the assertion that these contract teachers can fall within the definition of “occasional teacher” by reason of their job functions while remaining “teachers” within the meaning of Bill 100 and, hence, excluded from any bargaining unit for which certification may be granted under the *Labour Relations Act*. In other words, the suggestion is that “occasional teacher” and “Bill 100 teacher” are not always mutually exclusive categories, and that our description of the bargaining unit should make it clear that it does not include those who fall into both categories at the same time. Balancing this proposition against the above-noted concern that we not appear to exclude those who fall within both categories at different times, we considered the use of the words “save and except persons who, when they are employed as occasional teachers, are teachers as defined in the *School Boards and Teachers Collective Negotiations Act*”. Counsel agree that this would appear to exclude those whom they have identified. Of course, that language implicitly

accepts the proposition that a teacher within the meaning of Bill 100 can fall within the definition of "occasional teacher". We recognize that this is arguably so and that some exclusionary language ought to address those who fall within the scope of that argument. On further reflection, however, it seems to us that the exclusion of contract teachers who might be considered occasional teachers can be adequately noted by the words "save and except persons who, when they are employed as substitutes for other teachers, are teachers as defined in the *School Boards and Teachers Collective Negotiations Act*." As this merely reflects the necessary result of section 2(f) of the *Labour Relations Act*, it would be appropriate to use this language even when there are no contract teachers employed as substitutes for other teachers at the time the application is made. Accordingly, it appears to us that the following bargaining unit description would be appropriate in these applications:

all occasional teachers employed by the respondent in its secondary panel in [geographic area] save and except persons who, when they are employed as substitutes for other teachers, are teachers as defined in the *School Boards and Teachers Collective Negotiations Act*

with the usual clarity note that "occasional teacher" has the meaning assigned to it by clause 1(1)31 of the *Education Act*.

10. There may be situations in which a trade union has bargaining rights for some non-contract occasional teachers who would otherwise fall within a unit defined in terms of "all occasional teachers of the respondent (in its [elementary/secondary] panel)". In *Board of Education for the City of Hamilton and Ontario Secondary School Teachers' Federation, District 8* (unreported decision dated January 23, 1986), an arbitrator found that the parties to an agreement under Bill 100 had expanded its scope beyond contract teachers to cover those occasional teachers who are employed for a period of at least a month. If the OSSTF branch affiliate which was party to that agreement were itself a trade union within the meaning of clause 1(1)(p) of the *Labour Relations Act*, an application for certification for occasional teachers in that school board's occasional panel could not affect those "long-term" occasionals unless it was made during the open season (as calculated under the *Labour Relations Act*) of the school board's agreement with the branch affiliate. When it is said that some trade union already has bargaining rights under the *Labour Relations Act* for some persons who would otherwise fall within the bargaining unit description which appears at the end of the previous paragraph, the words "or are teachers as defined in the *Education Act* who fall within a bargaining unit for which any trade union held bargaining rights under the *Labour Relations Act* as of [the application date]" could be added to that description. We will not add those words here, as there is no suggestion in any of these applications that there were any secondary panel occasional teachers in existing bargaining units on the application.

11. We turn now to the individual applications before us.

The Sault Ste. Marie Application - Board File No. 0700-87-R

12. We find that

all occasional teachers employed by the respondent in its secondary panel in Sault Ste. Marie, save and except persons who, when they are employed as substitutes for other teachers, are teachers as defined in the *School Boards and Teachers Collective Negotiations Act*

constitute a unit of employees of the respondent appropriate for collective bargaining. The phrase

“occasional teacher” has the meaning assigned to it by clause 1(1) ¶31 of the *Education Act*, R.S.O. 1980, c.129, as amended.

13. We are satisfied that not less than thirty-five per cent of the employees of the respondent in that bargaining unit were members of the applicant at the time the application was made.

14. On the taking of the pre-hearing representation vote directed by the Board, more than fifty per cent of the ballots cast were cast in favour of the applicant.

15. A certificate will issue to the applicant with respect to the unit described in paragraph 12.

16. The Registrar will destroy the ballots cast in the pre-hearing representation vote taken in the Sault Ste. Marie application following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30-day period.

The North York Application

17. We find that

all occasional teachers employed by the respondent in its secondary panel in the City of North York, save and except persons who, when they are employed as substitutes for other teachers, are teachers as defined in the *School Boards and Teachers Collective Negotiations Act*

constitute a unit of employees of the respondent appropriate for collective bargaining. The phrase “occasional teacher” has the meaning assigned to it by clause 1(1) ¶31 of the *Education Act*, R.S.O. 1980, c.129, as amended.

18. We are satisfied that not less than thirty-five per cent of the employees of the respondent in the bargaining unit were members of the applicant at the time the application was made. Accordingly, the pre-hearing representation vote conducted in this application has the same effect as a representation vote taken under subsection 7(2).

19. Sylvia Sherman is an occasional teacher on the voters list. By letter dated October 18, 1987 and received by the Board on October 23, 1987, she asks that the vote be set aside. She claims that she received notice of the vote on September 23, 1987, 6 days before the vote was held. She complains this left insufficient time for her to discuss the matter with other occasional teachers, few of whom would actually have been at work at that time. She also complains that she was unable to get information from the applicant about the benefits of collective representation. She argues that these matters ought to have been addressed by OSSTF before the vote was held in some public forum “where everyone would have the right to be adequately and properly informed.” She also makes reference to the fact that of 270 persons on the voters lists, only 43 voted. She says this is not a “significant sampling.” She wonders whether the mail strike contributed to the “poor turnout” and whether it is “possible that some supply teachers did not, in fact, receive any notification of a vote.”

20. Dealing with the last point first, notice of the taking of the September 29th vote was mailed to each of the 270 persons on the voters list on September 18, 1987, addressed to the addresses they had given the respondent school board in connection with their employment as occasional teachers. Notice of the Returning Officer’s Report was similarly mailed to those persons

on October 6, 1987. No one has complained that late notice deprived them of the opportunity to vote. The degree of voter “turnout” is not surprising, in our experience. Our voter eligibility rules in these matters cast a very wide net: persons who have taught only one day in the year preceding the vote date may be eligible to vote (See *Board of Education for the City of York*, [1985] OLRB Rep. May 767; *The Board of Education for the City of Scarborough*, [1987] OLRB Rep. Jan. 119; and *The Board of Education for the City of Hamilton*, *supra*). It has been our experience with votes of occasional teachers that only a minority of eligible voters typically choose to exercise their right to cast ballots. Subsection 7(3) of the Act provides that “If on the taking of a representation vote more than 50 per cent of the ballots cast are cast in favour of the trade union ... the Board shall certify the trade union”. This focuses attention on the wishes of those who chose to cast a ballot. While the Board has the discretion to set aside a vote and conduct a second vote, it has not exercised that discretion merely because a small number of eligible voters chose to cast ballots (*Ottawa General Hospital*, [1973] OLRB Rep. Oct. 506) unless that number is zero because eligible voters feared, or might reasonably have feared, that theirs would be the only ballot cast (*A. V. Hallan Lathing & Plastering Limited*, [1977] OLRB Rep. Sept. 602, *Rainy River Valley Health Care Facilities, Inc.*, [1985] OLRB Rep. Feb. 316). Although we do not suggest that there could be no other “low turnout” situations in which the Board might exercise its discretion to conduct a second vote, we are not persuaded that we should do that in this case merely because the occasional teachers interested enough to vote numbered only 43 out of a possible 270.

21. As for Ms. Sherman’s concern that OSSTF did not hold or participate in some public forum to debate the benefits of collective bargaining, we can only note that it was under no *legal* duty to do so. As the Board noted in *Strathmere Lodge*, [1973] OLRB Rep. Aug. 425, “the Board is not concerned as to the manner in which a trade union conducts either an organizing campaign or electioneering when a vote is directed, provided there is no allegation of coercion or intimidation or any other unfair labour practice under the Act.” Eligible voters who feel that an applicant trade union has not adequately explained its position can vote against it. Finally, in a labour relations context, six days was quite adequate notice of the opportunity to answer the question “In your employment relations with North York Board of Education, do you wish to be represented by Ontario Secondary School Teachers Federation?”

22. The ballots of 2 of the 43 persons who attended at the vote were segregated as there was a dispute about their eligibility to vote. Of the remaining 41, 33 cast “YES” ballots; 8 ballots said “NO”. Clearly, in the vote directed by the Board, more than fifty per cent of the ballots cast were cast in favour of the applicant, whether or not either of the challenged voters was eligible to vote. We are not prepared to set aside the results of that vote.

23. Accordingly, a certificate will issue to the applicant with respect to the unit described in paragraph 17.

24. The Registrar will destroy the ballots cast in the pre-hearing representation vote taken in the North York application following the expiration of 30 days from the date of the decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30-day period.

The Wellington Application

25. In its pre-vote decision in this application, the Board noted that

8. The respondent takes the position that this application should not be entertained by the Board because the applicant filed a previous application within the last two months for the same bargaining unit, and this previous application was withdrawn after the applicant reviewed the

list. The respondent requests that the ballot box be sealed at the conclusion of this vote in order for it to have opportunity to make its representations in this respect at a later hearing before the Board. While the circumstances recited have not ordinarily resulted in the Board exercising its discretion under clause 103(2)(i) of the Act to refuse to entertain a subsequent application, that decision is not made at this stage. Unless in the meantime the respondent abandons its submission that this application should not be entertained, the ballot box shall be sealed and the ballots cast shall not be counted until further order of the Board.

The respondent did not abandon its submission. The ballot box was sealed following the taking of the vote. The respondent now argues that we should refuse to entertain this application in the exercise of our discretion under clause 103(2)(i), citing the Board's decisions in *J. W. Crooks Company*, [1972] OLRB Rep. Feb. 126 and *St. Joseph's Hospital at Sarnia*, [1984] OLRB Rep. Sept. 1264. The circumstances dealt with in those decisions are clearly distinguishable. Here there is only one previous application, which was made on May 1, 1987 and dismissed June 1, 1987 when the applicant sought leave to withdraw it. We do not think those circumstances warrant a refusal to entertain this application.

26. We find that

all occasional teachers employed by the respondent in its secondary panel in Wellington County, save and except persons who, when they are employed as substitutes for other teachers, are teachers as defined in the *School Boards and Teachers Collective Negotiations Act*

constitute a unit of employees of the respondent appropriate for collective bargaining. The phrase "occasional teacher" has the meaning assigned to it by clause 1(1) ¶31 of the *Education Act*, R.S.O. 1980, c.129, as amended.

27. We are satisfied that not less than thirty-five per cent of the employees of the respondent in the bargaining unit were members of the applicant at the time the application was made. Accordingly, the pre-hearing representation vote conducted in this application has the same effect as a representation vote taken under subsection 9(2) of the *Labour Relations Act*.

28. The ballots of two persons who attended at the vote in this application were segregated because their names did not appear on the voters lists. Neither of those persons has sought to make representations with respect to their entitlement to vote. Both the applicant and respondent say they were not eligible voters. The respondent states that neither worked as an occasional teacher in its secondary panel in the twelve-month period prior to the application date. The correct threshold test, however, is whether they taught on an occasion or occasions which fell within both the one-year period prior to June 25, 1987 and the one-year period prior to the date of the vote. If these individuals taught in the secondary panel sometime between the application date (June 11, 1987) and June 25, 1987, they might have been eligible voters. The parties are directed to advise the Board whether or not either individual taught in the secondary panel in that time frame. If they agree that one or both did, the ballot(s) of the person(s) who did shall be counted. Otherwise, the subject ballots shall remain segregated.

29. Subject to the directions in paragraph 28, we direct that all ballots cast in the representation vote in the Wellington application now be counted.

1612-87-R; 1613-87-R; 1614-87-R; 1615-87-R; 1616-87-R; 1617-87-R; 1618-87-R; 1619-87-R; 1620-87-R; 1702-87-R International Woodworkers of America, Applicant v. **Taiga Trucking (Ontario) 1980 Inc.**, Respondent; International Woodworkers of America, Applicant v. **Manroy Trucking Inc.**, Respondent; International Woodworkers of America, Applicant v. **Atway Transport Inc.**, Respondent; International Woodworkers of America, Applicant v. **Demers & Dargy Transport Inc.**, Respondent; International Woodworkers of America, Applicant v. **Gosselin Trucking**, Respondent; International Woodworkers of America, Applicant v. **Paul Gagnon Trucking**, Respondent; International Woodworkers of America, Applicant v. **J. Bernard Trucking**, Respondent; International Woodworkers of America, Applicant v. **Contractors Cleanup Services Limited**, Respondent v. **Labourers International Union of North America, Local 706**, Intervener; International Woodworkers of America, Applicant v. **Kopka Transport Inc.**, Respondent; International Woodworkers of America, Applicant v. **Paramount Transportation Limited**, Respondent

Certification - Practice and Procedure - Pre-Hearing Vote - Related Employer - Applicant requesting a pre-hearing vote in ten applications for certification - Applicant also seeking a declaration that the respondents constitute one employer - Board analyzing purpose and effect of pre-hearing vote - Effect of section 1(4) application on bargaining unit issue discussed - All drivers voted with ballots cast by employees of any one respondent separated - Ballots cast by person alleged to be dependent or independent contractors to be segregated

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *G. O. Shamanski* and *B. L. Armstrong*.

DECISION OF THE BOARD; November 4, 1987

1. These are 10 applications for certification in which the applicant has requested that the Board conduct a pre-hearing representation vote. The applicant has also filed an application for a declaration under subsection 1(4) of the *Labour Relations Act* ("the Act") that the respondents to these applications constitute one employer for the purposes of the Act (Board File No. 1633-87-R). The question to be addressed with respect to each of these certification applications is whether and in what manner the Board will conduct a pre-hearing representation vote or votes. Having regard to the issues raised by certain of the respondents, we begin by elaborating on the nature of that question and the purpose of the pre-hearing vote procedure provided for in section 9 of the Act.

2. Expedition is important in the adjudication of labour relations issues. As Chief Justice Estey (as he then was) observed *Journal Publishing Company of Canada Ltd. et al v. The Ottawa Newspaper Guild, Local 204 et al*, (unreported, Ontario Court of Appeal, March 31, 1977):

In the law which has grown up around labour relations in the province, and indeed elsewhere where the common law is pursued, the overriding principle invariably applied is that labour relations delayed are labour relations defeated and denied.

This is particularly so in certification applications. Having committed their support to a union, employees' desire for collective bargaining will be frustrated if their union's right to engage in it on their behalf is not promptly acknowledged and enforced. The union's support will be eroded by delay.

3. The need for expedition must compete with the requirements of natural justice. All those affected by a certification application must be given notice of it and the opportunity of a hearing. The process of adjudicating any issue in dispute, whether genuine or vexatious, will delay disposition of the application. So far as it can be accomplished, it is desirable that certification applications be dealt with in such a way that the adverse effects of this delay on employees' desire for representation by the applicant do not influence the result. That goal is adequately served if employee wishes are assessed as of the date determined under clause 103(2)(j) of the Act (generally about two weeks after the application is filed) on the basis of membership evidence filed by that date. It is sometimes necessary or desirable, however, to determine employee wishes by means of a representation vote. If in that event the vote is not taken until after all other issues are adjudicated, delay will influence the result with respect to employee wishes.

4. Section 9 of the Act allows the Board to conduct a representation vote or votes relatively quickly after an application is filed, before determining any question which is or could be in dispute among the parties affected by the application. That section provides as follows:

(1) Upon an application for certification, the trade union may request that a pre-hearing representation vote be taken.

(2) Upon such a request being made, the Board may determine a voting constituency and, if it appears to the Board on an examination of the records of the trade union and the records of the employer that not less than 35 per cent of the employees in the voting constituency were members of the trade union at the time the application was made, the Board may direct that a representation vote be taken among the employees in the voting constituency.

(3) The Board may direct that the ballot box containing the ballots cast in a representation vote taken under subsection (2) shall be sealed and that the ballots shall not be counted until the parties have been given full opportunity to present their evidence and make their submissions.

(4) After a representation vote has been taken under subsection (2), the Board shall determine the unit of employees that is appropriate for collective bargaining and, if it is satisfied that not less than 35 per cent of the employees in such bargaining unit were members of the trade union at the time the application was made, the representation vote taken under subsection (2) has the same effect as a the representation vote taken under subsection 7(2).

As the Board noted in *Emery Industries Limited*, [1980] OLRB Rep. Mar. 316 at paragraph 5:

The purpose of the pre-hearing, or "quick vote" procedure is to facilitate a prompt resolution of representation questions, by permitting the Board to test employee wishes as soon as possible following the application date. This avoids the potential prejudice which might arise if a representation vote had to await a decision following a formal certification hearing. Some delay is inevitable, but the pre-hearing vote procedure is a legislative attempt to remove some of the problems, and prejudice, associated with delay while, at the same time, ensuring that all of the parties will be given a full opportunity to make their submissions with respect to any matters in dispute.

5. Our function at this stage is to make the determinations contemplated by subsection 9(2) of the Act. We do not determine the appropriate bargaining unit or assess the weight to be given to the applicant's membership evidence. As appears from subsection 9(4) of the Act, those matters are only decided after the vote is conducted, when all interested persons will be notified in Form 71 of the contents of the Returning Officer's report and of their opportunity to make representations and have a hearing before the Board with respect to any issue affecting the certification application or the pre-hearing representation vote. Indeed, at this stage the Board does not attempt to resolve any dispute about its constitutional jurisdiction (*Kenting Earth Sciences Limited*, [1985] OLRB Rep. Feb. 293) or the applicant's "trade union status" (*Emery Industries Limited*, *supra*) or the identity of persons employed in any proposed bargaining unit at any relevant time

(*The Board of Education for the City of North York*, [1984] OLRB Rep. July 989), or the application of subsection 1(4) of the Act (*Satin Finish Hardwood Flooring (Ontario) Limited*, [1984] OLRB Rep. Nov. 1602). These and any other issues affecting whether and how the results of a pre-hearing vote should affect the disposition of the application for certification are only resolved *after* any such vote is conducted.

6. While we do not resolve such issues at this stage, we do need to know the immediate parties' positions on any issue which could affect the use to which the results of a pre-hearing representation vote may later be put. This is so that a meaningful voting constituency or constituencies can be struck and appropriate directions made concerning segregation of ballots cast by individuals or groups whose inclusion in or exclusion from the appropriate unit or units is in dispute. A pre-hearing vote is of little use unless one can later reconstruct from it a vote of the employees in the unit ultimately found appropriate by the Board. Accordingly, when an applicant requests a pre-hearing vote, the Board's practice is to authorize one of its Labour Relations Officers to examine the records of the applicant and of the respondent and to confer with the parties as to the description and composition of the appropriate bargaining unit, the description and composition of the voting constituency or constituencies, the list of employees as of the terminal date for the purposes of any vote which might be directed and all other matters relating to entitlement to and arrangements for such a vote, and to report to the Board thereon.

7. In accordance with that practice, an officer was authorized to make those inquiries in a coordinated fashion with respect to each of these applications. That officer met with the parties to these applications on October 7 and 8, 1987. His meeting continued on October 22, 1987. We have before us the officer's report on his meeting, which indicates that certain respondents requested additional time to elaborate their positions for the Board and that all parties were advised to have any additional written representations in the hands of the Board by October 29, 1987. Such additional representations as have been received from the parties are also before us.

8. In each of these applications, the applicant describes the unit of employees appropriate for collective bargaining as:

all employees of the respondent employed as truck and transport drivers in the Province of Ontario, save and except foremen and persons above the rank of foreman.

In their replies to the applications in which they are named respondent, all of the respondents except Atway Transport Inc., Paul Gagnon Trucking and Paramount Transportation Limited describe the appropriate bargaining unit as

all employees of the respondent employed as truck and transport drivers at and out of Thunder Bay, save and except foremen and persons above the rank of foreman.

In their replies to the applications in which they are named respondent, Atway Transport Inc. and Paramount Transportation Limited describe the appropriate bargaining unit as

all employees of the respondent employed as truck and transport drivers at and out of Paipoonge Township, save and except foremen and persons above the rank of foreman.

In its reply to the application in which it is named respondent, Paul Gagnon Trucking describes the appropriate bargaining unit as

all employees of the respondent employed as truck and transport drivers at and out of the Village of Hudson, save and except foremen and persons above the rank of foreman.

It does not appear (either from the material filed by the parties to these applications or the Labour Relations Officer's report on his meetings with them) that any of these disputes over the bargaining unit description affects the identity or number of persons actually employed in any appropriate bargaining unit on the relevant application date.

9. It is noteworthy that the applicant and all respondents agree that any appropriate unit is limited to "truck and transport drivers." In *University of Ottawa*, [1986] OLRB Rep. Mar. 353, the Board observed that:

While the scope of the parties' agreements over the description of the appropriate bargaining unit ordinarily establishes the range of likely determinations of that issue, that is not always so. The parties' agreement on a bargaining unit description does not relieve the Board of its statutory obligation to determine whether the agreed upon unit is appropriate. Parties' agreements on what would constitute an appropriate unit for the purposes of collective bargaining between them are ordinarily accorded considerable deference because they are presumed to reflect their special knowledge of the matters relevant to that determination. Such agreements are not determinative, however, and in certain circumstances the Board may decide not to accept the parties' agreement: *Tamco Ltd.*, [1974] OLRB Rep. Nov. 764; *North York Board of Education*, [1982] OLRB Rep. June 918; *St. Joseph's Hospital*, *supra*, [1983] OLRB Rep. June 984. Accordingly, when determining a voting constituency, the Board must be sensitive to the possibility that language agreed to by the applicant and respondent may not be accepted by the panel which makes the post-vote determination required by subsection 9(4) of the Act.

No doubt with those considerations in mind, the Labour Relations Officer did attempt to assemble the information necessary to consider whether the voting constituency or constituencies for any pre-hearing vote(s) could or should be defined in "all employee" terms. He was not able to obtain the necessary information from all respondents, however. Accordingly, we have not pursued that option. Of course, that decision in no way fetters the panel which will ultimately deal with the application on its merits in its decision whether to accept this limited agreement of the applicant and respondents.

10. The applicant's position seems to be that if all or some of the respondents are declared to constitute a single employer under subsection 1(4) of the Act, then all of the drivers employed by respondents affected by that declaration would constitute a single appropriate bargaining unit for which it wishes to be certified. Obviously, the application under subsection 1(4) will have to be dealt with before or in conjunction with the determination of the appropriate bargaining unit(s) in these applications. As with the bargaining unit determination, the issues in the application under subsection 1(4) can only be decided after affording the parties the opportunity of a hearing. As with the bargaining unit issue, we do not make any determination under subsection 1(4) at this stage. Because of its potential effect on the bargaining unit issue, however, it is important for us to accommodate, if we can, all possible outcomes of that application in making our determinations under subsection 9(2).

11. Bearing in the mind that the objective in exercising jurisdiction under subsection 9(2) is to gather information on employee wishes in such a way that the Board can later reconstruct a vote or votes of those who were in the unit or units ultimately found appropriate, the practical response in this situation is to vote all drivers employed by the respondents, keeping ballots cast by employees of any one respondent separate from those cast by the others. This can be done by determining the following ten voting constituencies:

VOTING CONSTITUENCY #1

all employees of Taiga Trucking (Ontario) 1980 Inc. employed as truck and transport drivers in the Province of Ontario, save and except foremen and persons above the rank of foreman.

VOTING CONSTITUENCY #2

all employees of Manroy Trucking Inc. employed as truck and transport drivers in the Province of Ontario, save and except foremen and persons above the rank of foreman.

VOTING CONSTITUENCY #3

all employees of Atway Transport Inc. employed as truck and transport drivers in the Province of Ontario, save and except foremen and persons above the rank of foreman.

VOTING CONSTITUENCY #4

all employees of Demers & Darga Transport Inc. employed as truck and transport drivers in the Province of Ontario, save and except foremen and persons above the rank of foreman.

VOTING CONSTITUENCY #5

all employees of Grosselin Trucking employed as truck and transport drivers in the Province of Ontario, save and except foremen and persons above the rank of foreman.

VOTING CONSTITUENCY #6

all employees of Paul Gagnon Trucking employed as truck and transport drivers in the Province of Ontario, save and except foremen and persons above the rank of foreman.

VOTING CONSTITUENCY #7

all employees of J. Bernard Trucking employed as truck and transport drivers in the Province of Ontario, save and except foremen and persons above the rank of foreman.

VOTING CONSTITUENCY #8

all employees of Contractors Cleanup Services Limited employed as truck and transport drivers in the Province of Ontario, save and except foremen and persons above the rank of foreman.

VOTING CONSTITUENCY #9

all employees of Kopka Transport Inc. employed as truck and transport drivers in the Province of Ontario, save and except foremen and persons above the rank of foreman.

VOTING CONSTITUENCY #10

all employees of Paramount Transportation Limited employed as truck and transport drivers in the Province of Ontario, save and except foremen and persons above the rank of foreman.

12. On examination of the records of the applicant and respondents, it appears that not less than 35 percent of the employees in voting constituency #10 were members of the applicant on September 22, 1987 (the date the application in Board File #1702-87-R was made) and, with respect to each other voting constituency, not less than 35 percent of the employees in the voting constituency were members of the applicant on September 11, 1987 (the date each of the 9 other applications was filed). In those applications in which there is a dispute about the identity of persons employed in the voting constituency on the application date, the applicant has the requisite appearance of support in any event of the outcome of that dispute. Accordingly, it appears we have the discretion under subsection 9(2) of the Act to direct that a pre-hearing representation vote be conducted in each of these voting constituencies. Nevertheless, certain of the respondents take the position that the Board either does not have the jurisdiction to order a pre-hearing vote or should decline to do so in the exercise of its discretion under subsection 9(2) of the Act.

13. Counsel for Contractors Cleanup Services Limited ("Cleanup") argues that:

... the Board does not have the jurisdiction to order a vote pursuant to s. 9(2) where there is more than one application date. So long as the Union is attempting to join Paramount Transportation Limited in a s.1(4) declaration with our client, there are under the circumstances by definition two Application dates. The threshold test for there to be a vote pursuant to s.9 is whether the Union had 35% or more membership support in the bargaining unit identified in s. 9(2) on the date of application.

The reference here is to the fact that the application in Board File No. 1702-87-R ("the Paramount application") was filed on September 22, 1987, while the other applications were filed on September 11, 1987. The potential significance of that fact is best explained by considering the consequences of one possible outcome in these matters and the companion application under subsection 1(4): a declaration that all ten respondents constitute a single employer for the purposes of the Act coupled with a finding that all truck and transport drivers of *all* respondents constitute *one* appropriate bargaining unit. That would then be the appropriate bargaining unit in each of the ten applications. Only one of the applications filed on September 11, 1987 would be "considered" in those circumstances, as each of the other nine applications would then be a "subsequent application" within the meaning of subsection 103(3) of the Act. In order to satisfy subsection 9(4) in the application then considered, the applicant would have to show, on the basis of the written evidence which it has already filed with the Board, that more than 35 percent of the employees in this unit were members on September 11, 1987, the application date in that application: *Board of Education for the City of North York*, [1987] OLRB Rep. Jan. 116; *Domtar Inc.*, [1987] OLRB Rep. Sept. 1132. All but one of the cards submitted with the Paramount application is dated after September 11, 1987 and, therefore, would not count in a subsection 9(4) assessment in those circumstances. Obviously, the same problem arises if employees of Paramount and *any* other respondent are found to constitute an appropriate unit following a declaration that Paramount and one or more other respondents constitute a single employer for the purposes of the Act. Membership evidence submitted with the Paramount application and dated after September 11, 1987 will "count" for the purposes of subsection 9(4) only if the Paramount application is "considered", which will happen only if Paramount employees are not included in a bargaining unit with employees of any other respondent *or* if all other applications affecting Paramount employees are dismissed.

14. Although not relevant to our jurisdiction to direct votes in the voting constituencies

described in paragraph 11, it is noteworthy that, on the material before us, it appears that not less than 35 percent of all drivers employed by *all* respondents were members of the applicant *on September 11, 1987*. There are some combinations of respondents (Paramount together with any one or more of Manroy Trucking Inc., Demers & Dargy Transport Inc. and Contractors Cleanup Services Limited, for example) about which it cannot be said that the applicant had the requisite membership support as of September 11, 1987 in a single unit consisting of all drivers of those respondents. If one of those combinations is ultimately found to be the appropriate unit in some of the applications filed September 11, 1987, those applications may be dismissed for failure to meet the membership test in subsection 9(4). That would not be the end of the matter, however, because then the “subsequent” Paramount application could be considered. We do not know whether or not the applicant would fail the subsection 9(4) membership test in those combination units as of September 22, 1987, the application date in the Paramount application, as we do not have lists of persons employed by the other respondents as at that date. It is not inconceivable that the subsection 9(4) test could be satisfied in those circumstances. In any event, none of this is critical to our jurisdiction to order a vote in the ten voting constituencies described in paragraph 11; the appearance test is satisfied with respect to each of those voting constituencies, as we have noted in paragraph 12. The possibility of some outcome in which the membership test in subsection 9(4) may not be met does not warrant a refusal to conduct a vote, although it may warrant a direction that all ballot boxes be sealed pending the decisions contemplated by subsection 9(4): see *The Board of Education for the City of North York, supra*; and, *Satin Finish Hardwood Flooring (Ontario) Limited, supra*.

15. Counsel for Atway argues that certain persons whom the union has added to the voters list in Voting Constituency #3 are “independent contractors” and not employees. If they are employees by virtue of being “dependent contractors”, he argues, that must be established before a vote can affect them. In effect, he argues that disputes about the voters list have to be settled before the vote can be conducted. That is not so. If someone says that a driver falls within a voting constituency, that driver may cast a ballot; if someone says that driver does not fall within the voting constituency, his or her ballot will be segregated and not counted pending resolution of the dispute after the vote, as is contemplated by subsection 9(4).

16. Counsel for Atway also complains that the applicant has not said whether the persons in dispute are dependent contractors, but has merely noted that “employee” is defined by clause 1(1)(e) of the Act to include a dependent contractor. He argues, that

Insofar as dependent contractors are *prima facie* entitled to a separate bargaining unit, the Union has entirely circumvented the provisions of the *Labour Relations Act* which require 35 per cent Union membership prior to the holding of a pre-certification vote.

If the disputed individuals are “dependent contractors”, subsection 6(5) of the Act requires that they be placed in a separate bargaining unit unless the Board is satisfied that they wish to be included in a unit with other employees. This latter issue is sometimes addressed in a separate “vote”, in which individuals who are dependent contractors are asked to indicate, by secret ballot, whether or not they wish to be included in a unit with other employees. The applicant has not requested such a vote and, in the circumstances, we do not propose that one be conducted at this time. A separate vote is not necessarily the only way that the requirement in subsection 6(5) could be satisfied if these persons are ultimately found to be dependent contractors. In any event, the ballots of voters alleged to be dependent contractors can be segregated and these issues can all be dealt with after the votes are conducted. The applicant could not later be certified for a separate unit of dependent contractors, no matter how many of them voted in its favour, unless the membership test in subsection 9(4) were satisfied with respect to that unit. As we have not defined the disputed persons as a separate voting constituency, the level of apparent membership support in

that group is irrelevant at this stage. As a matter of interest, however, we note that support for the union among these disputed persons is well in excess of 35 percent.

17. Both before and after the officer's meeting of October 22, 1987, counsel for Atway took the position that

If the Application for Certification includes dependent contractors, there are many other contractors whose names are not on the voting list who have identical relationships (or a lack thereof) with Atway Transport Inc. as those which the Union has sought to place on the voting list. As a result, the voting constituency in no way reflects the constituency of those individuals who may ultimately be brought into the bargaining unit as a result of certification.

The officer's report indicates that counsel declined the opportunity to name these persons, despite being advised to do so. Similarly, counsel for Cleanup took the position that:

There are other corporate entities which, it is submitted, should be joined in a s. 1(4) declaration in the event the current Respondents are joined. The Union should not be permitted to "pick and choose" which organizations it seeks to join and thereby affect the constituency. That would be an abuse of process.

Counsel has not named these "other corporate entities", either in the reply he filed on behalf of Cleanup in the application under subsection 1(4) or in his submissions to the officer or in written submissions to the Board in connection with these applications. The existence of such other entities is irrelevant unless it can be said that their employees would also form part of an appropriate bargaining unit. All parties were called upon to state their positions on the appropriate bargaining unit in these applications at the meetings conducted by the Labour Relations Officer. We are at a loss to understand how either of these respondents can argue that a vote should not be directed because of matters which they have declined to particularize. We need not decide now whether these specific matters can be particularized after votes are conducted so as to defeat the utility of those votes. We do note the Board's observations in *Simpsons Limited* (Board File No. 1876-84-R, decision dated October 28, 1985, unreported) at paragraph 14:

One of the important objects of a Labour Relations Officer's preliminary meeting with the parties in these cases is to ascertain their position on the appropriate bargaining unit issue and define (and narrow, if possible) the nature of any disagreement on that issue. The pre-hearing vote process would be subverted if a respondent or intervener could advance for the first time at hearing a position or allegation which would, if accepted, render meaningless a pre-hearing vote which could have been conducted in a meaningful way if that position or allegation had been disclosed in an appropriate and timely fashion before the vote was conducted. Accordingly, if a respondent or intervener proposes later to argue that the bargaining unit proposed by the applicant is inappropriate, it must give full particulars of its challenge, and of the description of the unit it considers appropriate, before the Officer's meeting with the parties concludes.

(See also *Kenting Earth Sciences Limited*, *supra*, at paragraph 9).

18. Counsel for Cleanup argues that a vote or votes should not be conducted because

Employees cannot know whether they would be voting for a bargaining unit consisting of employees of Contractors Cleanup Services Ltd. alone or of employees of a composite employer of which Contractors Cleanup Services Ltd. would be but a small part.

In addition, counsel for Contractors Cleanup and counsel for Atway Transport Inc. ("Atway") both argue that the applicant's communications with affected employees have so misrepresented the nature and possible results of the subsection 1(4) application that, to use the words of counsel for Atway, "the employees of the various parties will not know what they are voting for."

19. Employees are not ordinarily asked to vote for or against a bargaining unit when the Board conducts a representation vote (although such a vote can be conducted under subsection 6(1)). When there is no incumbent or competing applicant, each eligible voter is asked to answer “yes” or “no” to a question in the form “Do you wish to be represented by the applicant in your employment relations with your employer?” It is open to argument that answers to this question are an unreliable basis for a certification decision if they are given at a time when the identity of the employer for purposes of collective bargaining is uncertain. It may be said, however, that in the scheme prescribed by the *Labour Relations Act*, evidence of membership in the union is treated, in effect, as a vote by the member for certification of the union with respect to any bargaining unit of employees of any employer in which the member may then or thereafter be employed. Accordingly, it is also open to argument that ballots cast in favour of a trade union should be treated in a similar manner. On this latter view, it may be argued, uncertainty about the employer or bargaining unit should not vitiate the effectiveness of the signification of desire to be represented by the union in employment relations.

20. We do not suggest that either argument is more likely to succeed than the other, or that there are no other relevant arguments. The issue has to be dealt with on the basis of all the relevant evidence and argument which any affected party wishes taken into consideration. It can only be decided after such parties have been afforded the opportunity of a hearing. We would be effectively deciding this point in the respondents’ favour without a hearing, however, if we were to refuse the applicant a pre-hearing vote because of the mere possibility that, at the post-vote hearing contemplated by subsection 9(4), the Board would conclude that the results of the vote are not reliable. If the Board were to come to that conclusion, it would not be obliged to act on the results of that vote. As in its other aspects, the decision to be made at this stage should accommodate the range of possible outcomes on this issue. Conducting the vote best accomplishes that objective. From a labour relations perspective, the prejudice caused by conducting a vote which is later found useless is vastly outweighed by the prejudice caused by failing to conduct a vote which would later have been found useful.

21. The only thing we decide at this point is a matter of procedure: whether and how to conduct a pre-hearing representation vote. We do not decide what use, if any, will be made of the results of the vote. That decision is made later, after the parties have had the opportunity of a hearing. We are only determining what procedure will be followed in assembling potentially relevant information prior to hearing. We are not determining any aspect of the merits of these certification applications or the related application under subsection 1(4). From that perspective, the complications introduced by the subsection 1(4) application do not warrant our refusing to conduct a pre-hearing representation vote, nor do the allegations of misrepresentation. Whether they warrant a refusal to act on the results of such a vote is a matter to be determined after the vote is conducted.

22. Having afforded the respondents a full opportunity to indicate the grounds of their opposition to the conduct of pre-hearing representation votes in these applications, we are not persuaded that this is one of those exceedingly rare situations in which the applicant’s requests should be declined in the exercise of our discretion under subsection 9(2) of the Act. The arguments of counsel for Atway and Cleanup go to the question whether effect could or should later be given to the results of any pre-hearing representation votes conducted in connection with these applications. That is a matter which can be addressed, after the votes are conducted, on any ground which may fairly be raised at that time, bearing in mind the opportunity the parties have already had to make representations both through the Board’s Labour Relations Officer and otherwise. If the Board is then persuaded that no effect can or should be given to any or all of the votes directed herein, then they will have no effect.

23. We direct that pre-hearing representation votes be conducted in each of the voting constituencies described in paragraph 11. Each person employed in a voting constituency on October 5, 1987 who is employed on the date the vote in that constituency is conducted will be eligible to cast a ballot in that vote. In each vote, voters will be asked whether or not they wish to be represented by the applicant in their employment relations with the employer named in the voting constituency description.

24. In order to accommodate the parties' disputes over bargaining unit description, ballots cast

- a) in Voting Constituency #3, by persons alleged to be dependant or independent contractors on either October 5, 1987 or the date of the vote;
- b) in Voting Constituency #6, by persons who were not employed "at and out of the Village of Hudson" on both October 5, 1987 and the date of the vote;
- c) in Voting Constituencies 3 and 10, by persons who were not employed "at and out of Pairpoonge Township" on both October 5, 1987, and the date of the vote; and
- d) in all other Voting Constituencies, by persons who were not employed "at and out of the City of Thunder Bay" on both October 5, 1987, and the date of the vote

shall be segregated and not counted.

25. Having regard to the matters discussed in paragraphs 14 and 18 through 21 hereof, the ballot boxes in each of the votes shall be sealed and none of the unsegregated ballots shall be counted except upon agreement of the applicant and *all* respondents.

26. The Board is in receipt of the following letter from Labourers' International Union of North America, Local No. 607:

Re: OLRB File No.'s 1612-87-R

and #1702-87-R

At the Labour Relations Officer meeting held October 7, 1987 in Thunder Bay, the applicant International Woodworkers of America (Canada) stated that the bargaining rights sought were not in the construction industry. Enclosed please find a copy of a written understanding to this effect, dated October 7, 1987.

We request that the Ontario Labour Relations Board endorse its record in these files with this understanding and upon doing so, our interest in these matters will be resolved.

If what is sought is a limitation on the scope of any certificate which might otherwise issue to the applicant, that is a matter to be raised in the appropriate way after the votes are conducted.

27. All matters concerning the conduct of these votes are referred to the Registrar under section 68 of the Board's Rules of Procedure.

0872-87-R United Brotherhood of Carpenters and Joiners of America, General Workers' Union, Local 1030, Applicant v. **Zenith Wood Turners Inc.** and 148620 Canada Inc., Respondents

Certification Where Act Contravened - Employees laid off in violation of Act - Whether damage done to ability of employees to express wishes repaired by recall of and letter to employees - Small bargaining unit a factor in determining whether a vote would be useful - First contract legislation relevant in assessing the viability of the core of membership support - Certificate issuing pursuant to section 8

BEFORE: *Judith McCormack*, Vice-Chair, and Board Members *J. F. Davidson* and *H. Kobryn*.

APPEARANCES: *Frank Manoni* and *Andrew Root* for the applicant; *Terry D. McEwan* and *Antoinette Csanadi* for the respondents.

DECISION OF JUDITH MCCORMACK, VICE-CHAIR, AND BOARD MEMBER H. KOBRYN;
November 6, 1987

1. The names of the respondents are amended to read: "Zenith Wood Turners Inc." and "148620 Canada Inc.".

2. This is an application for certification in which the applicant has invoked section 8 of the *Labour Relations Act*. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of that Act.

3. Having regard to the parties' agreement and the evidence before us, we find that the respondents carry on related activities or businesses under common control or direction, and we direct that they shall be treated as constituting one employer for the purposes of the Act.

4. Again, having regard to the agreement of the parties, and the manner in which the Board generally describes bargaining units of this type, the Board finds the following is an appropriate unit of employees for collective bargaining:

All employees of the respondents in the County of Glengarry, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff and students employed during the school vacation period.

5. The evidence before us establishes that Antoinette Csanadi is the president of 148620 Canada Inc., and the secretary-treasurer of Zenith Wood Turners Inc. Her husband, Frank Csanadi, is the president of Zenith Wood Turners Inc. and the secretary-treasurer of 148620 Canada Inc. Together Mr. and Mrs. Csanadi own all the shares of the two companies. Zenith Wood Turners Inc. manufactures wood turning products such as stair components, stools, kitchen cabinet accessories and so forth, and 148620 Canada Inc. distributes those products. The two companies, which have recently moved to Ontario, occupy the same premises.

6. In June of 1987, Andrew Root started working for the respondents. There was some dissatisfaction among employees with respect to low wages, and Mr. Root, who had been an active member of the applicant at his previous job initiated discussion of a union in general terms. It was apparent that his views received a warm reception. On the first day he started to sign up employees for membership in the applicant, forty-three per cent of the bargaining unit had signed membership cards by lunch time. After lunch Mr. Root approached two employees who declined to sign

cards. (There was some hearsay evidence to the effect that one of those employees subsequently approached two employees who had signed cards and told them that if they signed for the union, they would lose their jobs. However, no reason was offered as to why first hand evidence of this event could not have been provided, and we are not inclined to accord any weight to it in the circumstances.)

7. Mr. Root testified that one of the two employees who declined to sign then went to see Florent Beloin, the manager of Zenith Wood Turners Inc., and spent some forty-five minutes in his office. Mr. Beloin in turn visited the office of Lorna Farley, the manager of 148620 Canada Inc. Mrs. Csanadi told the Board that Ms. Farley called her that afternoon and advised her that employees were not happy, and that they were talking about a union. Mrs. Csanadi instructed Ms. Farley to lay off all employees except for the minimum necessary to operate. Mrs. Csanadi testified that she was "trying to nip the problem in the bud". That afternoon, Ms. Farley laid off half of the bargaining unit. The respondents admit that the layoffs contravened the Act inasmuch as they were at least in part motivated by the information received from Ms. Farley.

8. The applicant then filed the instant application, and a complaint under section 89 of the Act with respect to three of the individuals laid off. On July 5th or 6th, Mrs. Csanadi received the Board's Notice of Application for Certification. She then sought the advice of a lawyer and retained her current counsel. Shortly thereafter, the laid off employees were recalled. Some of those recalled returned to work and some did not. The section 89 complaint was settled, and three employees were compensated for their losses. In that settlement, which was placed in evidence before us on the agreement of the parties, the respondents also conceded that the layoffs were in violation of the Act. In addition, Mrs. Csanadi sent the following letter to employees:

TO EMPLOYEES OF ZENITH WOOD TURNERS INC. AND 148620 CANADA INC.

As you are aware the Carpenter's Union has applied to the Ontario Labour Relations Board to be certified as your Trade Union Representative.

I want to make sure that you are aware of all of the facts concerning this application and the companies' position regarding your being represented by a Union.

The Union is asking in its application to the Labour Board that it be certified without a vote by the employees. It claims that the Board should do that even if the Union doesn't have enough support among the employees. The Union says that this should happen because the company has acted improperly in the following ways.

The Union claims that the company laid off Andy Root, Tammy Chenier and Jean King on June 23, 1987 because they were soliciting our employees to join the Carpenter's Union. I want you to know the companies' position and what will be done about these claims:

1) We are contacting Andy Root, Tammy Chenier and Jean King to tell them they can report to work immediately. I can assure you that NO ONE needs to be worried that they will be laid off because they support the Union. That is your right and we will not interfere with it in any way. I am also contacting Michael Denny, Gilbert Paquette, Maurice Bellefeuille and Roch Hurtubise who were also laid off on June 23, 1987. The Union has not claimed that these people were laid off because of the Union activity, but I want to be certain that no-one thinks otherwise so the same offer of re-employment is being made to each of these people as well.

2) The Union says that some of our employees have been telling the other employees that if you join the union you will be fired. I want you to know that if someone is making such statements, he is NOT speaking for the management of this Company. NO ONE will be fired for simply joining a union.

3) If the Union is certified the companies will negotiate in good faith with its representative.

I would not be honest if I said that I wanted to deal with the Carpenter's Union rather than with each employee on an individual basis. But it is your right and decision to choose to bring in a Union or not and I do not want to interfere with that decision. Likewise, I do not wish a union to be certified without the support of a majority of you or as a result of any action on the Companies' part.

9. Before the Board will exercise its discretion to certify a union under section 8, three conditions must be met. It must be established that there has been:

- (1) An employer contravention of the Act, so that,
- (2) the true wishes of the employees are not likely to be ascertained; and
- (3) that the Union has membership support adequate for collective bargaining.

On the basis of the respondents' admissions and the evidence before the Board, we conclude that the respondents violated sections 64 and 66 of the *Labour Relations Act* as a result of the layoffs, which were at least in part motivated by anti-union animosity. The first condition having been met, we now turn to whether the second element of section 8 has been satisfied.

10. The evidence establishes that half the bargaining unit was abruptly laid off within hours of the start of the applicant's organizing campaign. While the reason given to employees for the layoffs was lack of work, the timing of the layoffs would have made it clear to employees that they were connected to the organizing drive. This is one of the most serious unfair labour practices in which an employer can engage. The respondents' conduct goes to the core of the economic dependency which is the primary basis for an employee's vulnerability in the workplace. The Board has noted previously in *DI-AL Construction Limited*, [1983] OLRB Rep. Mar. 356 that a discharge is one of the most flagrant means by which an employer can influence employees:

A discharge is one of the most flagrant means by which an employer can hope to dissuade its employees from selecting a trade union as their bargaining agent. The respondent's action in discharging Mr. Holland because of his support for the union would have made it clear to employees, the depth of the respondent's opposition to the union and likely have created concerns among them that if they were also to support the union, it might jeopardize their own employment. In the face of a discharge, I doubt that employees would now be able to freely decide for or against trade union representation. This is particularly so given the small size of the bargaining unit and the respondent's earlier conduct. In these circumstances, I am satisfied that because of the respondent's unlawful conduct, the current true wishes of the employees are not likely to be ascertained in a representation vote. Accordingly, I am of the view that the applicant should be certified pursuant to the provisions of section 8 of the Act.

We find these comments pertinent to the layoffs before us as well, and we note that the Board has found that discharges or layoffs have given rise to a finding that employees' wishes are not likely to be ascertained in a number of cases: see, for example, *Dylex Limited*, [1977] OLRB Rep. June 357; *Riverdale Frozen Foods Limited*, [1979] OLRB Rep. Apr. 338; *The Globe and Mail*, [1982] OLRB Rep. Feb. 181; *Elbertsen Industries Limited*, [1984] OLRB Rep. Nov. 1564; *Cambridge Canadian Foods Inc.*, [1987] OLRB Rep. Mar. 319, and *Zest Furniture Industries Limited*, [1987] OLRB Rep. Feb. 299.

11. In this case however, we must also determine whether the initial damage done to the ability of employees to express their wishes freely was repaired by the subsequent recall of employ-

ees and the respondents' letter. On balance, we conclude that it was not. We note that employees were not recalled and the letter was not sent until the union filed this application and the section 89 complaint. Even then, a number of employees who were recalled did not return to work for a variety of reasons. As a result, the visible effects of the unfair labour practices would continue to linger despite the respondents' efforts. The letter itself is almost word for word the same as one considered by the Board in *Elbertsen Industries, supra*, where the Board concluded that it was insufficient to undo the damage done by the employer's unfair labour practices. We come to a similar conclusion in somewhat different circumstances. Although the letter is relatively innocuous, it is also not particularly reassuring in light of the events which had already taken place. Mrs. Csanadi continues to make it clear in the letter that she is opposed to the union, and her testimony before the Board indicates that she is still very bitter about the union's activities and about Mr. Root's role in these events in particular. We also observe that she was blunt about expressing those views. Although she claimed she had not spoken to employees about the union at one point in her testimony, she subsequently contradicted herself in this regard and was also less than frank in other respects. Given her position and the size of this operation, we find it reasonable to infer that employees are aware of her views, whether directly or indirectly. In short, we do not think that employees are likely to feel that this letter is either particularly convincing or comforting. In fact, the last sentence suggests that the letter was written at least in part with an eye to strengthening the respondents' position on a section 8 application.

12. The Board has considered that a small bargaining unit may be a factor in determining whether a vote will reveal the true wishes of employees in a number of cases including *DI-AL Construction, supra*; *Primo Importing and Distributing Company Limited*, [1981] OLRB Rep. July 953, and *Rockhaven and Motels (Peterborough) Limited*, [1979] OLRB Rep. June 559. In this case, the size of the bargaining unit suggests that the anonymity which the ballot box might provide in a larger workplace cannot be relied upon to the same extent. Indeed, it was apparent from Mrs. Csanadi's testimony that she believed that she already knew to some degree which employees supported and which employees opposed the union.

13. In any event, we note that the layoffs were not directed only at union supporters. In other circumstances this might be a mitigating factor since it might weaken the connection between the union activity and the layoffs in the minds of employees. However, the timing and sequence of events in this case establishes a cause and effect relationship between the campaign and the layoffs too strongly for this fact to make a difference to the reasonable perceptions of employees. Indeed, in this case where such a connection is so clear, the indiscriminate nature of the layoffs may actually work against the ability of employees to express their views without fear. At its best, the ballot box can only protect the identity of a particular employee's choice. Employees in this case would be justified in thinking that regardless of whether the employer knew how each of them had voted in particular, there might well be general repercussions with respect to job security if a union was certified. The respondents, through the layoffs, have shifted the focus for employees from the issue of collective bargaining to the issue of job security. A vote at this point means that employees are likely to be voting on whether they wish to keep their jobs, and not whether they wish to be represented by a union. In our view, this is not a case where the alternative remedies available under section 89 would be sufficient to address the problems described. We conclude that the true wishes of employees are not likely to be ascertained as a result of the respondents' contravention of the Act.

14. Turning to the last element of section 8, the Board has set out its approach in assessing the adequacy of membership support in *K-Mart Canada Limited (Peterborough)*, [1981] OLRB Rep. Jan. 60 as follows:

In approaching its discretion to grant certification under [section 8] of the Act, the Board must make some prognosis as to the future viability of bargaining. In so doing it does not necessarily view the membership strength which the applicant has on the date of certification as a static and immutable figure. Where the evidence establishes that a workplace has been subjected to the chilling effect of unfair labour practices that tend to suppress any expression of pro-union sentiment, it is not unreasonable to expect that the granting of a Board's certificate, with or without the assistance of other remedies under the *Labour Relations Act*, will in some degree restore the legitimacy of the trade union in the eyes of the employees. The Board therefore takes into account the potential for union support to grow among employees who beforehand might have been afraid to associate themselves with the union. With the granting of a certificate, assuming that all unfair labour practices will end, there is little reason to doubt that the union's base of support will grow and that more and more employees will come forward to participate in the endeavours of their bargaining agent.

In determining whether a union has support adequate for collective bargaining purposes within the meaning of [section 8] of the Act, the Board's concern is whether there is a number of employees, sufficiently representative of the employees in the bargaining unit, with the ability to negotiate with their employer on the content of a collective agreement. In this regard, bargaining ability is to be distinguished from bargaining power. The question is not whether they can amount a successful strike, or whether they will eventually realize substantial gains at the bargaining table. Rather, it is whether they have the core of support sufficient to negotiate with the employer. A [section 8] certificate, like any certificate, is only a beginning and need not be seen as anything more.

In making such an assessment, the Board has said in *Viceroy Construction Company Limited*, [1977] OLRB Rep. Sept. 562:

The Act requires the Board to determine what is adequate membership support by the light of its own opinion depending on the facts of each case. In forming its opinion in any case, the Board must have regard to all of the surrounding circumstances. Relevant factors include whether the employer's contravention of the Act occurred early or late in an organizing campaign, the nature and gravity of the contravention itself and the relative strength and influence of the employee members on other employees within the bargaining unit.

15. In this case, the union's campaign started strongly when forty-three per cent of employees signed membership cards in a matter of hours. It is equally clear that the respondents' unfair labour practices stopped the organizing drive dead in its tracks. While there has been some employee turnover since that date, we are satisfied that at the present time, there is still a core of membership support which is adequate for collective bargaining. We note in this regard that the opportunity for the union to consolidate and cultivate support for collective bargaining has been broadened by the advent of section 40a, which provides for the arbitration of first collective agreements in certain circumstances. Where those circumstances exist, the imposition of a first collective agreement may provide a stabilizing influence on the labour relationship as well as a grace period during which employees can experience the benefits of collective bargaining while their employer becomes more accustomed, and perhaps even reconciled, to the new labour relationship. Without suggesting that section 40a might eventually be applicable to these particular parties, at the same time we cannot ignore the legislative environment which operates generally on the collective bargaining process in assessing the viability of the core of membership support here.

16. Subsequent to the hearing in this matter, the Board received a document purporting to contain the signatures of six employees of one of the respondents, which included the following text:

We as Employees of Labelle Series have a right to have a Union and right to not have a Union. These are the signatures of the Employees who do not want a Union. We have all signed on our own will and judgement.

(six signatures)

Give us the right to choose yes or no for entering the union.

We deserve the right to have a recount.

Please contact us at:

(name and address) thank you

Employees of Labelle Series.

17. When the application before us was filed, the Board's Notice to Employees of Application for Certification and of Hearing (Form 6) was posted in the workplace. That notice contains the following paragraphs:

4.-(1) The Board will not hear evidence or representations of employees objecting to certification of the applicant unless one or more documents, sometimes referred to as petitions, expressing objection to the certification of the applicant are filed with the Board.

(2) A document referred to in subsection (1),

(a) must be signed by the objecting employee or employees;

(b) must be,

(i) received by the terminal date if sent other than by registered mail, or

(ii) mailed to the Board by the terminal date shown in paragraph 3 if sent by registered mail; and

(c) must be accompanied by the name of the employer concerned and the return mailing address of the employee or employees filing the document or of the representative of the employee or employees.

(3) The objecting employee or employees or a representative of the objecting employee or employees **MUST ATTEND THE BOARD'S HEARING AND PRODUCE A WITNESS OR WITNESSES** who, from personal knowledge and observation, can describe the circumstances in which each document was prepared, circulated and signed, and verify each signature.

No oral evidence of employee objection to certification of the applicant will be accepted by the Board except to identify and substantiate written evidence which complies with these requirements.

5. IF YOU DO NOT ATTEND AT THE HEARING, THE BOARD MAY PROCEED IN YOUR ABSENCE AND YOU WILL NOT BE ENTITLED TO ANY FURTHER NOTICE IN THE PROCEEDINGS.

[emphasis original]

Among other things, the notice also provided employees with the initial hearing date, the terminal date and notice of the applicant's claim to certification under section 8.

18. If we can characterize this document as a petition, it was filed three months after the terminal date and subsequent to the completion of the hearing. None of the persons listed on it nor anyone on their behalf attended the hearing, and no evidence was submitted with respect to it. At no time either before or after the document was filed did anyone request further hearings to receive evidence with respect to it or attempt to present such evidence to the Board in any manner.

19. It is well established in the Board's jurisprudence and set out in the Board's Rules of Procedure that petitions must be filed by the terminal date set by the Registrar. (See Rule 73 and *We're Econoprint Fast*, [1987] OLRB Rep. March 440.) Rule 73(5) provides as follows:

The Board may dispose of the application without considering the statement of desire of any employee who fails to appear in person or by a representative and adduce evidence that includes testimony in the personal knowledge and observation of the witness as to,

- (a) the circumstances concerning the origination of the statement of desire; and
- (b) the manner in which each signature on the statement of desire was obtained.

20. Moreover, the Board requires evidence with respect to the circumstances in which petitions are signed for sound labour relation reasons. As the Board noted in *Morgan Adhesives of Canada Ltd.*, [1975] OLRB Rep. Nov. 813:

There is a natural suspicion which attaches to a statement of desire following closely upon a union organizing campaign. The Board must assure itself that the "change of heart" indicated by the employees who sign the petition in opposition to the union after having indicated support for that same union is a free choice unimpeded by overt or subtle pressures.

The burden of proving that, on the balance of probabilities, a petition represents the voluntary expression of the employees who signed it lies with the petitioners. The Board set out its reasoning in this regard in *Radio Shack*, [1978] OLRB Rep. Nov. 1043:

24. The Board has long held that there is an onus on a party relying on a statement of desire in opposition to an application for certification to establish that the "sudden change of heart" by those who have signed for the union and shortly thereafter repudiated the union, represents a voluntary change of heart. The Board recognizes the delicate and responsive nature of the employer-employee relationship and having regard to it, is circumspect in its assessment of the voluntariness of any statement of desire which bears the signatures of employees who have also signed cards in support of the union. The Board's approach to these matters is described in the leading *Pigott Motors* case, 63 CLLC ¶16,264 in the following terms:

"In view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act. It is precisely for this reason and because the Board has discovered in a not inconsiderable number of cases that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence of a form and of a nature which will provide some reasonable assurance that a document such as a petition signed by employees purporting to express opposition to the certification of a trade union, truly and accurately reflects the voluntary wishes of the signatories."

21. If we characterize the document as something less than a petition, and if we assume, without finding, that it is relevant to our evaluation of the adequacy of membership support, evidence similar to that usually required by the Board with respect to petitions is equally important, and for the same reasons. Our concerns in this regard are heightened by the fact that admitted unfair labour practices preceded the arrival of the document. If we are not able to conclude that this document is a voluntary expression of employee wishes, it is simply not useful to us in fulfilling our responsibilities under section 8. In this case, none of the necessary evidence was provided, despite ample notice. Indeed, we do not have evidence that the persons whose names are on the document are the persons who actually signed it, or even whether they are employees, owing to discrepancies in the employers' lists. As it stands now, the document before us is little more than an untimely and unproven piece of paper, and we are not prepared to accord it any weight.

22. We conclude that the three conditions of section 8 have been met. A certificate will issue to the applicant.

DECISION OF BOARD MEMBER J. F. DAVIDSON;

1. I am not persuaded that the circumstances of this case warrant certification pursuant to the extraordinary provisions of section 8 of the *Labour Relations Act*.

2. The Board must first find the employer in contravention of the Act. In this instance, the employer secured knowledgeable counsel on being notified of the certification application, and immediately acted upon counsel's advice to reinstate the six laid off employees, acknowledging a violation of the Act. The Board did not therefore have to make a finding and give a direction under sections 64 and 66 of the Act, as the employer had freely and voluntarily rectified the layoff situation on its own initiative. There is not, therefore, a standing violation of the Act. It is also noteworthy that, while the discovery of a union organizing drive was clearly the "trigger" for the layoffs, economic and situational factors also bore on the decision, which was made very quickly, by telephone. There was indication that business was slow, orders were down, and the plant could be operated with fewer employees, and the employer and co-owner, Mrs. Csanadi dealt with the issue in this context and in the absence of her husband and partner, who was apparently ill. The business had recently re-located from Quebec to Ontario, and Mrs. Csanadi was not familiar with Ontario Labour Relations law. We have then a rather complex and difficult decision matrix, at some distance from the site. The quick decision taken by Mrs. Csanadi is reflective therefore of various considerations, and would have to be followed by a series of more direct, specific actions before this employer could be characterized as engaging in a serious, intentional campaign of illegal acts against its employees or the union. Further, the layoffs were described to employees as "due to a lack of work caused by vacation slowdown", and were non-selective, in that they were seniority based, with five of the employees having under three months seniority and one just over.

3. As to whether or not the true wishes of the employees can now be determined, I am dubious of the Board's ability to make an inference, on the evidence presented, that this could not be ensured by means of a supervised representation vote. The Board has stated in *Smith Beverages Limited*, [1975] OLRB Rep. Dec. 956, that:

The situation is quite different on a representation vote, however, where the employee can usually rest assured that their choice will not be revealed to their employer; and therefore, the Board requires evidence of *intimidation or coercion such that the secrecy of the ballot cannot be relied upon* to ensure a free expression of employee views.

[my emphasis added]

In paragraph 19 of the *Ex-Cell-O Wildex* case, [1977] OLRB Rep. June 370, the Board states:

...that an applicant must establish *substantial employer interference* in the certification process to secure a determination...(i.e. section 8)

[my emphasis added]

Further, in paragraph 61 of the *Globe and Mail* case, [1982] OLRB Rep. Feb. 189, we find:

The Board has applied the section where the *cumulative effect of a range of unlawful* employer activities...has the effort of undermining the confidence in the rule of law...

[my emphasis added]

This is not a case where the employer has directly threatened employees with termination, or cut-backs or closure, should they decide to join a union. Neither is there a pattern of employer misconduct here, a cumulative range of actions designed to prevent the organizing process. Rather, we have the one event, a layoff of six persons, allegedly due to a shortage of work, quickly rescinded. The employer publicly stated to its employees (exhibits #4 and #5) that it was reinstating the laid off employees, would not interfere with employee rights to unionization and would not lay-off or fire employees for joining the union. Other than the layoff, there was no evidence presented that the employer had, in any other way attempted to coerce, intimidate, or threaten its employees in any way, no cumulative range of substantial interfering actions. It would seem to me, given the circumstances in the foregoing, that the employer retraction and declaration would sufficiently allay employee fears to allow reasonable confidence in the efficacy of a supervised representation vote in this case. There just isn't the evidence of a significant range of intimidational behaviour on the part of the employer to cast doubt on the ability to ascertain the true wishes of the employees through a supervised secret ballot. As well, the employer has shown good faith in both word and deed since the certification application, and is unlikely to attempt to interfere with the process, under the guidance of knowledgeable counsel, and given the supervision of a vote by the Board.

4. Further to the question of the true wishes of the employees, one must consider that the animus for the union organizing drive did not develop spontaneously amongst a group of long service employees, but rather was initiated by an individual with a long-standing association with the union in question during his first week of employment with this firm, made up largely of new employees within their first few months of their employment. Additionally, the composition of the labour force has significantly changed since the application in June through turnover, and there are apparently a number of new employees who were not on site at the time of the application.

5. Finally, in determining whether or not the union has adequate membership support, the Board must consider membership evidence not only at the terminal date, where it was forty-three per cent, but also at the present date, where it would appear that there has been some reduction due to turnover. Section 8 speaks in the present tense, "*has* membership support", which I would infer to mean at the time of the section 8 application. (See *Dylex Ltd.*, Ontario Divisional Court, October 25, 1977.)

6. I believe that the significant change in work force composition coupled with the substantial dilution of a single implied employer intimidation warrant the direction of a supervised secret ballot, representation vote, and that the certification of these employees without a vote under section 8 is both inappropriate and an abrogation of their right to freely chose whether or not they wish to have a union. To do otherwise would be to place at risk that which we cannot know, the true wishes of the employees. I do not believe there is sufficient employer intimidation in this case such as to cast serious doubt on the supervised secret ballot process.

CASE LISTINGS OCTOBER 1987

	PAGE
1. Applications for Certification	257
2. Applications for Declaration of Related Employer.....	272
3. Sale of a Business	272
4. Union Successor Rights	272
5. Applications for Declaration Terminating Bargaining Rights.....	273
6. Applications for Declaration of Unlawful Strike (Construction Industry)	274
7. Complaints of Unfair Labour Practice	274
8. Applications for Consent to Early Termination of Collective Agreement	278
9. Financial Statement	278
10. Applications for Determination of Employee Status.....	278
11. Complaints Under the Occupational Health & Safety Act	278
12. Construction Industry Grievances	278
13. Applications for Reconsideration of Board's Decision	281

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING OCTOBER 1987

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

0287-86-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. VS Services Ltd. (Respondent) v. Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees, Local 647 (Intervener)

Unit: "all employees of the respondent at Navistar International, Chatham, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (4 employees in unit)

3417-86-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Darrow Developments Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, the United Counties of Prescott and Russell, and in the geographic Townships of Elizabethtown, Augusta and Edwardsburg and all lands south thereof in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

0212-87-R: Christian Labour Association of Canada (Applicant) v. King Nursing Home Ltd. (Respondent)

Unit #1: "all employees of the respondent in Bolton, save and except the administrator, the director of case, supervisors and persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (22 employees in unit)

Unit #2: "all employees of the respondent in Bolton regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except the administrator, the director of care, supervisors, and persons above the rank of supervisor, office and clerical staff" (30 employees in unit)

0339-87-R: International Association of Heat & Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. 574643 Ontario Inc., c.o.b. C.B. Construction (Respondent)

Unit: "all journeymen and apprentice insulators and asbestos workers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all journeymen and apprentice insulators and asbestos workers in the employ of the respondent in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton in the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

0566-87-R: Ontario Nurses' Association (Applicant) v. Douglas Memorial Hospital (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent in Fort Erie, save and except the Head Nurse, persons above the rank of Head Nurse, and persons regularly employed for not more than 24 hours per week" (22 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: (see *Bargaining Agents Certified Subsequent to a Post-Hearing Vote*)

0666-87-R: Labourers' International Union of North America, Local 527 (Applicant) v. Ottawa Structural Concrete Services Ltd. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors of the construction industry in the Regional Municipality of Ottawa Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman" (22 employees in unit)

0816-87-R: Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees, Local 647, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Humpty Dumpty Foods Limited (Respondent)

Unit: "all employees of the respondent in the Newmarket Branch employed in or out of the Regional Municipalities of York and Peel and the Counties of Simcoe and Dufferin save and except the supervisor and those above the rank of supervisor" (4 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0838-87-R: International Union of Operating Engineers, Local 772 (Applicant) v. Copley, Noyes, & Randall Limited (Respondent)

Unit: "all stationary engineers and persons primarily engaged as their helpers, employed by the respondent in Hamilton, Ontario, save and except the supervisor of building maintenance, utilities and security, and those above that rank" (9 employees in unit) (*Having regard to the agreement of the parties*)

0935-87-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. C&W Asphalt Paving Company of Wallaceburg Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all construction labourers, truck drivers, and employees engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same in the employ of the respondent in all sectors of the construction industry other than the industrial, commercial and institutional sector in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman" (15 employees in unit)

1074-87-R: United Steelworkers of America (Applicant) v. 359087 Ontario Limited, c.o.b. as Wawa Motor Hotel (Respondent)

Unit: "all employees of the respondent in the town of Wawa, save and except supervisors, persons above the rank of supervisor, night auditor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (37 employees in unit)

1135-87-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. A. J. MacKinnon & Associates, Angus J. MacKinnon Consultants Limited (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondents in all other sectors in the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foremen" (4 employees in unit)

1157-87-R: International Union of Operating Engineers, Local 793 (Applicant) v. Targa Limited (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman” (6 employees in unit)

1207-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Calvano Lumber & Trim Co. Ltd. (Respondent)

Unit: “all employees of the respondent in the City of Mississauga, save and except office, clerical and sales staff, foreman, and persons above the rank of foreman” (4 employees in unit)

1225-87-R: Labourers’ International Union of North America, Local 1059 (Applicant) v. Thornton Sand & Gravel Limited (Respondent) v. Group of Employees (Objectors)

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman” (5 employees in unit) (*Having regard to the agreement of the parties*)

1230-87-R: Bakery, Confectionary & Tobacco Workers International Union, Local 264 (Applicant) v. Fibread Corporation (Respondent)

Unit: “all employees of the respondent in Metropolitan Toronto, save and except supervisors, those above the rank of supervisor, office, clerical and sales staff, and students employed during the school vacation period” (26 employees in unit) (*Having regard to the agreement of the parties*)

1243-87-R: United Food & Commercial Workers International Union, Local 633 (Applicant) v. H.W. Gluck Limited (c.o.b. as Keswick I.G.A.) (Respondent) v. Group of Employees (Objectors)

Unit: “all meat department employees of the respondent in Keswick, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (43 employees in unit) (*Clarity Note*)

1259-87-R: United Steelworkers of America (Applicant) v. 359087 Ontario Limited, c.o.b. as Wawa Motor Hotel (Respondent)

Unit: “all employees of the respondent, in the Town of Wawa, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors and persons above the rank of supervisor” (19 employees in unit) (*Having regard to the agreement of the parties*)

1277-87-R: Retail, Wholesale & Department Store Union (Applicant) v. Temvest Incorporated, c.o.b. as Temelini’s Supermarket (Respondent) v. United Food & Commercial Workers Union, Local 175 (Intervener)

Unit: “all employees of the respondent in the City of Sault Ste. Marie, save and except manager and persons above the rank of manager” (3 employees in unit) (*Having regard to the agreement of the parties*)

1303-87-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Dominion Textile Inc. (Respondent)

Unit: “all employees of the respondent in the City of Hawkesbury, save and except foremen, persons above the rank of foreman, office and sales staff” (117 employees in unit) (*Having regard to the agreement of the parties*)

1343-87-R: International Woodworkers of America (Applicant) v. Kimberly-Clark of Canada Limited (Respondent) v. Lumber & Sawmill Workers' Union, Local 2693 (Intervener)

Unit: "all employees of the respondent in the Pulpwood & Forest Products Operations - Woodlands who are engaged in Woods Operations on the limits and on the work sites of the respondent" (676 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1424-87-R: Textile Processors, Service Trades, Health Care, Professional & Technical Employees International Union, Local 351 (Applicant) v. 408464 Ontario Ltd., c.o.b. as Upper Village Furniture Mfg. (Respondent)

Unit: "all employees of the respondent in Cornwall save and except supervisors, persons above the rank of supervisor, office and clerical staff, sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (17 employees in unit).

1462-87-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Execotel Espanola Inc. (Respondent)

Unit: "all employees of the respondent in the Town of Espanola, save and except Assistant Hotel Manager, persons above the rank of Assistant Hotel Manager, and office staff" (12 employees in unit) (*Having regard to the agreement of the parties*)

1478-87-R: Brewery, Malt & Soft Drink Workers, Local 304 (Applicant) v. Impact Cleaning Services Limited (Respondent)

Unit: "all employees of the respondent at Molson's Ontario Breweries Limited, 640 Fleet Street, in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor" (15 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1479-87-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. H.W. Gluck Limited, c.o.b. as Keswick I.G.A. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in Keswick save and except supervisors, persons above the rank of supervisor, office and clerical staff, meat department employees, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (44 employees in unit) (*Having regard to the agreement of the parties*)

1545-87-R: Energy & Chemical Workers Union (Applicant) v. Chinook Chemicals Company (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent employed as long haul truck drivers, working at or out of its plant in Sombra, Ontario, save and except supervisors, persons above the rank of supervisor, technical innovation personnel, office and sales staff, persons employed in a co-operative training programme in a recognized university, college or school, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and employees for whom any trade union held bargaining rights as of the 31st day of August, 1987" (14 employees in unit)

1570-87-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, U.A.W. (Applicant) v. VS Services Ltd. (Respondent)

Unit: "all employees of the respondent at Eaton Yale Ltd., in the Town of Wallaceburg, save and except supervisors, persons above the rank of supervisor, office staff, and chef" (7 employees in unit) (*Having regard to the agreement of the parties*)

1589-87-R: United Food & Commercial Workers International Union (Applicant) v. Bud Miller's Restaurants Limited (Respondent)

Unit #1: "all employees of the respondent carrying on business as Silas McCabes at 3032A Danforth Avenue in the Municipality of Metropolitan Toronto, save and except manager, persons above the rank of manager,

persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (8 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent carrying on business as Silas McCabes at 3032A Danforth Avenue in the Municipality of Metropolitan Toronto, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except manager, and persons above the rank of manager" (5 employees in unit) (*Having regard to the agreement of the parties*)

1594-87-R: International Brotherhood of Electrical Workers, Local 1687 (Applicant) v. John Anthony Waite, c.o.b. as J.C. Electric (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all electricians and electricians' apprentices in the employ of the respondent in all other sectors of the construction industry in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

1607-87-R: Public Service Alliance of Canada (Applicant) v. Moose Band Development Corporation, c.o.b. as Wagnahgun Security Services (Respondent)

Unit: "all employees of the respondent in the Town of Moose Factory, save and except the manager and those persons above the rank of manager" (8 employees in unit) (*Having regard to the agreement of the parties*)

1637-87-R: United Steelworkers of America (Applicant) v. Federated Genco Limited (Respondent)

Unit: "all employees of the respondent in the City of Burlington, save and except foremen, persons above the rank of foreman, office, clerical and sales staff and employees in bargaining units for which any trade union held bargaining rights as of September 14, 1987" (4 employees in unit) (*Having regard to the agreement of the parties*)

1639-87-R: Ontario Nurses' Association (Applicant) v. Harold & Grace Baker Centre (Respondent)

Unit #1: "all registered and graduate nurses employed by the respondent in the Municipality of Metropolitan Toronto, in a nursing capacity in the retirement home section, save and except the retirement home co-ordinator and persons above the rank of retirement home co-ordinator, and persons regularly employed for not more than 24 hours per week" (2 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all registered and graduate nurses employed by the respondent in the Municipality of Metropolitan Toronto in a nursing capacity in the retirement home section for not more than 24 hours per week, save and except retirement home co-ordinator and persons above the rank of retirement home co-ordinator" (2 employees in unit) (*Having regard to the agreement of the parties*)

1655-87-R: International Association of Machinists & Aerospace Workers (Applicant) v. Calvanaire Industries Ltd. (Respondent) v. Employee (Objector)

Unit: "all employees of the respondent in the Town of Strathroy, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (84 employees in unit) (*Having regard to the agreement of the parties*)

1659-87-R: Labourers' International Union of North America, Ontario District Council (Applicant) v. Cupido Construction Limited (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in the construction industry in the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of

Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

1660-87-R: Ontario Public Service Employees Union (Applicant) v. Tillsonburg & District Association for the Mentally Retarded employed in or out of Oxford County and the Regional Municipality of Haldimand Norfolk, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except directors, managers, program consultants, apartment support workers, persons above such rank, and office and clerical staff" (38 employees in unit) (*Having regard to the agreement of the parties*)

1661-87-R: Sheet Metal Workers' International Association, Local 47 (Applicant) v. Rainbow Neon & Plastic Signs Ltd. (Respondent)

Unit: "all employees of the respondent in the City of Gloucester, save and except foremen, persons above the rank of foreman, commercial artist, office, clerical and sales staff" (10 employees in unit) (*Having regard to the agreement of the parties*)

1667-87-R: Ontario Nurses' Association (Applicant) v. General Motors of Canada Limited (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent, at 1901 Eglinton Avenue East, in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor" (3 employees in unit) (*Having regard to the agreement of the parties*)

1671-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Penwood Manufacturing Company Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

1692-87-R: Laundry & Linen Drivers & Industrial Workers, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Super Carnival Food Store Limited (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except assistant department managers, persons above the rank of assistant department manager, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (75 employees in unit) (*Having regard to the agreement of the parties*)

1694-87-R: Retail, Wholesale & Department Store International Staff Union (Applicant) v. Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Respondent)

Unit: "all employees of the respondent in Ontario save and except Canadian Director, persons above the rank of Canadian Director, office and clerical staff" (7 employees in unit)

1695-87-R: Teamsters, Chauffeurs, Warehousemen & Helpers, Local 880, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Canadian Electro-coating Ltd. (Respondent)

Unit: "all employees of the respondent in Windsor, save and except supervisors, persons above the rank of supervisor, office, sales and technical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (5 employees in unit) (*Having regard to the agreement of the parties*)

1716-87-R: Service Employees International Union, Local 240, S.E.I.U., AFL:CIO:CLC (Applicant) v. Visiting Homemakers Association (Respondent)

Unit: "all employees of the respondent in Metropolitan Toronto, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (54 employees in unit) (*Having regard to the agreement of the parties*)

1718-87-R: United Headwear, Optical & Allied Workers Union of Canada, Local 4 (Applicant) v. Imperial Optical Company Ltd. (Respondent)

Unit: "all employees of the respondent in the City of Owen Sound, save and except forepersons, persons above the rank of foreperson, licensed ophthalmic dispensers, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (3 employees in unit) (*Having regard to the agreement of the parties*)

1721-87-R: Sheet Metal Workers' International Association (Applicant) v. Black & McDonald Limited (Respondent)

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

1722-87-R: International Union of Operating Engineers, Local 793 (Applicant) v. Johnston Rock Boring Tunnel Systems Ltd. (Respondent)

Unit: "all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all journeymen sheet metal workers and registered sheet metal apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

1741-87-R: United Brotherhood of Carpenters & Joiners of America (Applicant) v. Rentex Displays Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

1742-87-R: Canadian Textile & Chemical Union (Applicant) v. Nelsino Maintenance Services Ltd. (Respondent)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, and office staff" (5 employees in unit) (*Having regard to the agreement of the parties*)

1753-87-R: Energy & Chemical Workers Union (Applicant) v. Halton Crushed Stone Limited (Respondent)

Unit: "all employees of the company at its quarry in the County of Halton save and except foremen, persons

above the rank of foreman, office and scalehouse staff" (18 employees in unit) (*Having regard to the agreement of the parties*)

1766-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. 438090 Ontario Limited, c.o.b. as Centennial Railings (Respondent)

Unit: "all employees of the respondent in the Town of Richmond Hill, save and except foremen, persons above the rank of foreman, office, clerical and sales staff" (7 employees in unit) (*Having regard to the agreement of the parties*)

1778-87-R: International Brotherhood of Painters & Allied Trades, Local 557 (Applicant) v. F & W Painting & Decorating (Respondent)

Unit: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all painters and painters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

1838-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Brantford Store Fixtures Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

1153-87-R: International Woodworkers of America (Applicant) v. Levesque Plywood Limited (Respondent)

Unit: "all employees of the respondent at Hearst, save and except foremen, persons above the rank of foreman, office and sales staff, scalers, and persons regularly employed for not more than 24 hours per week" (200 employees in unit) (*Having regard to the agreement of the parties*)

Number of persons on voters' list at start of vote	200
Number of persons who cast ballots	184
Number of ballots marked in favour of applicant	175
Number of ballots marked in favour of The Lumber & Sawmill Workers' Union, Local 2995, of the United Brotherhood of Carpenters & Joiners of America	9

1217-87-R: Canadian Paperworkers Union (Applicant) v. Domtar Inc. (Respondent) v. Office & Professional Employees International Union (Intervener)

Unit: "all salaried employees of the respondent's Fine Paper Mills in its Cornwall offices, save and except foremen, supervisors and persons above this rank, salesmen, programmers, senior buyer, engineers or persons of relative status, senior secretaries, security guards, time study men, janitors, cleaners, hourly-rated employees covered by Locals 212 and 338, employees in the Domtar Woodlands and Technical Service Department, and persons engaged in a confidential capacity in matters relating to labour relations in the personnel department" (108 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	108
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Number of persons who cast ballots	90	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		81
Number of ballots marked in favour of intervener		8

1252-87-R: International Woodworkers of America (Applicant) v. Domtar Inc. (Respondent) v. Lumber & Sawmill Workers Union, Local 2693 of the United Brotherhood of Carpenters & Joiners of America (Intervener)

Unit: "all employees of the respondent at its Domtar Forest Products, Woodlands Division at Red Rock who are engaged in woods operations on the limits and on the worksites of the respondent" (118 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list		118
Number of persons who cast ballots	118	
Number of spoiled ballots		3
Number of ballots marked in favour of applicant		101
Number of ballots marked in favour of intervener #1		14

1281-87-R: International Woodworkers of America (Applicant) v. Great Lakes Forest Products Limited (Respondent)

Unit: "all employees of the respondent who are engaged in woods operations on the limits and in the work sites of the company" (971 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list		1027
Number of persons who cast ballots	680	
Number of spoiled ballots		4
Number of ballots marked in favour of applicant		528
Number of ballots marked in favour of The Lumber and Sawmill Workers' Union		148

1294-87-R: International Woodworkers of America (Applicant) v. Mike's Supermarket (Hearst) Limited (Respondent) v. Lumber & Sawmill Workers' Union, Local 2995, of the United Brotherhood of Carpenters & Joiners of America (Intervener)

Unit: "all employees of the respondent in Hearst employed for not more than 24 hours per week and students employed during the school vacation period, save and except store manager and persons above the rank of store manager" (12 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list		12
Number of persons who cast ballots	12	
Number of ballots marked in favour of the applicant		11
Number of ballots marked in favour of intervener		1

1295-87-R: International Woodworkers of America (Applicant) v. Mike's Food Stores (Hearst) Ltd. (Respondent) v. Lumber & Sawmill Workers' Union, Local 2995, of the United Brotherhood of Carpenters & Joiners of America (Intervener)

Unit: "all employees of the respondent in Hearst, save and except store manager, persons above the rank of store manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (12 employees in unit) (*Having regard to the agreement of the party*)

Number of names of persons on list as originally prepared by employer		12
Number of persons who cast ballots	11	
Number of ballots marked in favour of applicant		11
Number of ballots marked in favour of intervener		0

1352-87-R: International Woodworkers of America (Applicant) v. E. B. Eddy Forest Products Ltd. (Respondent) v. Lumber & Sawmill Workers Union, Local 2693 (Intervener)

Unit: "all employees of the respondent in its Forestry Division who are engaged in Woods Operations on the limits and on the work sites of the respondent" (422 employees in unit) (*Having regard to the agreement of the party*) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer		422
Number of persons who cast ballots	229	
Number of ballots marked in favour of applicant		179
Number of ballots marked in favour of intervener		50

1353-87-R: International Woodworkers of America (Applicant) v. Domtar Inc. (Respondent) v. Lumber & Sawmill Workers Union, Local 2693 of United Brotherhood of Carpenters & Joiners of America (Intervener)

Unit: "all employees of the respondent in its White River Division engaged in woods operations on the limits and on the work sites" (135 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Notes*)

Number of names of persons on list as originally prepared by employer		135
Number of persons who cast ballots	110	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		91
Number of ballots marked in favour of intervener		18

1404-87-R: International Woodworkers of America (Applicant) v. Welwood of Canada Limited (Respondent) v. Lumber & Sawmill Workers Union, Local 2693 of United Brotherhood of Carpenters & Joiners of America (Intervener)

Unit: "all employees of the respondent at Longlac, Ontario, engaged in woods operations and on the work sites of the respondent" (51 employees in unit) (*Having regard to the agreement of the party*) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer		51
Number of persons who cast ballots	24	
Number of ballots marked in favour of applicant		18
Number of ballots marked in favour of intervener		6

1405-87-R: International Woodworkers of America (Applicant) v. Caraman Contracting Limited (Respondent) v. Lumber & Sawmill Workers Union, Local 2693 of United Brotherhood of Carpenters & Joiners of America (Intervener)

Unit: "all employees of the respondent at Thunder Bay, Ontario, engaged in woods operations on the limits and on the work sites of the respondent" (43 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer		43
Number of persons who cast ballots	22	
Number of ballots marked in favour of applicant		21
Number of ballots marked in favour of intervener		1

1431-87-R: International Woodworkers of America (Applicant) v. North West Timber Ltd. (Respondent) v. Lumber & Sawmill Workers' Union, Local 2693 of United Brotherhood of Carpenters & Joiners of America (Intervener)

Unit: "all employees of the respondent who are engaged in Woods Operations on the limits and on the work sites of the respondent" (65 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer		65
Number of persons who cast ballots	22	
Number of ballots marked in favour of applicant		14
Number of ballots marked in favour of intervener		8

1472-87-R: International Woodworkers of America (Applicant) v. Abitibi-Price Inc. (Respondent) v. Lumber

& Sawmill Workers' Union, Local 2995 of United Brotherhood of Carpenters & Joiners of America (Intervener)

Unit: "all employees of the respondent in the Iroquois Falls Woods Division engaged in woods operations on the limits and on the work sites of the respondent save and except forepersons, persons above the rank and office staff" (197 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer		197
Number of persons who cast ballots	118	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		105
Number of ballots marked in favour of intervener		12

Bargaining Units Certified Subsequent to a Post-Hearing Vote

3257-86-R: Magnussen & Control Plus Employee Association (Applicant) v. Magnussen Furniture Manufacturers Limited (Respondent)

Unit: "all employees of the respondent in the Township of Wilmot, save and except supervisors, persons above the rank of supervisor and office staff constitute a unit of employees appropriate for collective bargaining" (39 employees in unit)

Number of names of persons on revised voters' list		39
Number of persons who cast ballots	37	
Number of ballots marked in favour of applicant		31
Number of ballots marked against applicant		6

3506-86-R: Energy & Chemical Workers Union (Applicant) v. Servico Limited (Respondent)

Unit #1: (see *Applications for Certification Dismissed Subsequent to Post-Hearing Vote*)

Unit #2: "all service station employees of the respondent at its service station at 1299 Kingston Road, Pickering, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors and persons above the rank of supervisor" (4 employees in unit)

Number of persons on list as originally prepared by employer		4
Number of persons who cast ballots	4	
Number of ballots marked in favour of applicant		3
Number of ballots marked against applicant		1

0508-87-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Northumberland & Newcastle Board of Education (Respondent)

Unit: "all occasional teachers employed by the respondent in its secondary panel in the County of Northumberland and the Town of Newcastle, save and except employees in bargaining units for which any trade union held bargaining rights as of May 20, 1987" (99 employees in unit)

Number of names of persons on list as originally prepared by employer		99
Number of persons who cast ballots	17	
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	15	
Number of segregated ballots cast by persons whose names appear on voters' list	2	
Number of ballots marked in favour of applicant		14
Number of ballots marked against applicant		1

0566-87-R: Ontario Nurses' Association (Applicant) v. Douglas Memorial Hospital (Respondent)

Unit #1: (see *Bargaining Agents Certified Without Vote*)

Unit #2: "all registered and graduate nurses regularly employed in a nursing capacity for not more than 24 hours per week by the respondent in Fort Erie, save and except the Head Nurse and persons above the rank of Head Nurse" (37 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list		35
Number of persons who cast ballots	30	
Number of ballots marked in favour of applicant		26
Number of ballots marked against applicant		4

0702-87-R: Ontario Catholic Occasional Teachers' Association (Applicant) v. The Nippissing District Roman Catholic Separate School Board (Respondent)

Unit: "all occasional teachers employed by the respondent, save and except employees teaching pursuant to Part XI of the Education Act" (68 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer		68
Number of persons who cast ballots	28	
Number of ballots marked in favour of applicant		25
Number of ballots marked against applicant		3

Applications for Certification Dismissed Without Vote

2284-86-R: Labourers' International Union of North America, Local 527 (Applicant) v. L'Abbe Construction (Ontario) Ltd. (Respondent) v. Canadian Construction, Building Maintenance & General Workers' Union (N.C.C.L.) (Intervener) (20 employees in unit)

0057-87-R: Labourers' International Union of North America, Local 183 (Applicant) v. Country Homes (King) Limited (Respondent) (2 employees in unit)

0686-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Kenaidan Contracting Ltd. (Respondent) (3 employees in unit)

0955-87-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Westfort Hotels Ltd. (Respondent) v. Group of Employees (Objectors) (16 employees in unit)

1546-87-R: Service Employees Union, Local 183 (Applicant) v. E. J. McQuigge Lodge (Respondent) (39 employees in unit)

1599-87-R: Canadian Union of Restaurant & Related Employees Hotel Employees & Restaurant Employees Union, Local 88 (Applicant) v. Red Lobster Canada, division of General Mills Canada, Inc. (Respondent) v. Group of Employees (Objectors) (82 employees in unit)

1704-87-R: United Brotherhood of Carpenters & Joiners of America, Local 16669 (Applicant) v. Concept IV General Contracting Ltd. (Respondent) (3 employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

1120-87-R: International Woodworkers of America (Applicant) v. Industrial Hardwood Products Ltd. (Respondent)

Unit: "all employees of the respondent in the City of Thunder Bay, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (25 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list		25
Number of persons who cast ballots	22	
Number of ballots marked in favour of applicant		11

Number of ballots marked against applicant	11
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1330-87-R: Energy & Chemical Workers Union (Applicant) v. Procor Limited (Respondent) v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Local 75 (Intervener)

Unit: "all employees of the respondent at the Sarnia Car Repair Shop in Sarnia save and except foremen, persons above the rank of foreman, office staff and security guards" (23 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of persons on voters' list at start of vote	23
Number of persons who cast ballots	18
Number of ballots marked in favour of applicant	2
Number of ballots marked in favour of intervener	16

1454-87-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. D & C Roussy Industries Ltd. (Respondent)

Unit: "all employees of the respondent in the City of London, save and except foremen, persons above the rank of foreman, office, sales and technical staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period" (374 employees in unit)

Number of names of persons on list as originally prepared by employer	374
Number of persons who cast ballots	335
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	330
Number of segregated ballots cast by persons whose names appear on voters' list	5
Number of spoiled ballots	3
Number of ballots marked in favour of applicant	124
Number of ballots marked against applicant	203
Ballots segregated and not counted	5

1596-87-R: United Electrical, Radio & Machine Workers of Canada (UE) (Applicant) v. Dominion Automotive Industries Inc. (Respondent)

Unit: "all employees of the respondent in the Town of Whitby, save and except foremen, persons above the rank of foreman, office, technical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (138 employees in unit)

Number of names of persons on list as originally prepared by employer	138
Number of persons who cast ballots	114
Number of ballots marked in favour of applicant	36
Number of ballots marked against applicant	78

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

3425-86-R: Labourers International Union of North America, Local 183 (Applicant) v. Urban Equities Sherwood Inc., and Hanson Needler Corporation (Respondents)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham save and except non-working foremen and persons above the rank of non-working foreman" (12 employees in unit)

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	12

Number of ballots marked in favour of applicant	3
Number of ballots marked against the applicant	6
Ballots segregated and not counted	3

3506-86-R: Energy & Chemical Workers Union (Applicant) v. Servico Limited (Respondent)

Unit #1: "all service station employees of the respondent at its service station at 1299 Kingston Road, Pickering, Ontario, save and except supervisors and persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (6 employees in unit)

Unit #2: (see *Bargaining Agents Certified Subsequent to a Post-Hearing Vote*)

Number of names of persons on list as originally prepared by employer	6	6
Number of persons who cast ballots	6	
Number of ballots marked in favour of applicant		2
Number of ballots marked against applicant		4

0451-87-R: Labourers International Union of North America, Local 493 (Applicant) v. Precast Tank & Vault Co. Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at North Bay, Ontario, save and except foremen, persons above the rank of foreman, office, sales and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (18 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list		18
Number of persons who cast ballots	16	
Number of ballots marked in favour of applicant		6
Number of ballots marked against applicant		10

08980-87-R: Amalgamated Clothing & Textile Workers Union, Toronto Joint Board (Applicant) v. Dorothea Knitting Mills Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, designers, operating engineers, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (214 employees in unit)

Number of names of persons on revised voters' list		214
Number of persons who cast ballots	204	
Number of spoiled ballots		4
Number of ballots marked in favour of applicant		92
Number of ballots marked against applicant		104
Ballots segregated and not counted		4

1119-87-R: United Steelworkers of America (Applicant) v. 4500 Taxi Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent in the City of Welland, save and except manager and dispatcher, persons above the rank of manager and dispatcher, office, clerical and sales staff, and dependent contractors" (32 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list		32
Number of persons who cast ballots	26	
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	25	
Number of segregated ballots cast by persons whose names do not appear on voters' list	1	
Number of ballots marked in favour of applicant		11

Number of ballots marked against applicant	14
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1155-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. G.I.C. Interiors Ltd. (Respondent)

Unit: “all employees of the respondent at 2720 Slough Street in Mississauga, Ontario, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff” (17 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	17	17
Number of persons who cast ballots	17	
Number of ballots marked in favour of applicant		7
Number of ballots marked against applicant		10

1244-87-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. 537670 Ontario Limited (Respondent)

Unit #1: “all employees of the respondent at its Journey's End Motel in Windsor, save and except assistant manager, those above the rank of assistant manager, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, and persons in bargaining units for which any trade union held bargaining rights as of August 6, 1987” (7 employees in unit)

Number of names of persons on revised voters' list	7	7
Number of persons who cast ballots	7	
Number of ballots marked in favour of applicant		2
Number of ballots marked against applicant		5

Unit #2: “all employees of the respondent at its Journey's End Motel in Windsor regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except assistant manager, those above the rank of assistant manager, and persons in bargaining units for which any trade union held bargaining rights as of August 6, 1987” (2 employees in unit)

Number of names of persons on revised voters' list	2	2
Number of persons who cast ballots	2	
Number of ballots marked in favour of application		1
Number of ballots marked against applicant		1

Applications for Certification Withdrawn

0684-86-R: Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees, Local 647, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. VS Services Ltd. (Respondent)

2729-86-R: Teamsters Union Local 938, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Richard's Delivery Service Ltd. (Respondent)

1534-87-R: United Food & Commercial Workers Union, Local 278W (Applicant) v. United Cooperatives of Ontario (Cottam & Essex) (Respondent)

1638-87-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Town of Haldimand (Respondent)

1688-87-R: Ontario Liquor Board Employees' Union (Applicant) v. Bluewater Bridge (Sarnia) Duty Free Shoppe (Respondent)

1717-87-R: United Steelworkers of America (Applicant) v. Bimac Canada Metallurgical Limited (Respondent)

1724-87-R: Canadian Union of Public Employees (Applicant) v. The Municipality of Dysart, et al. (Respondents)

1841-87-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Cloydon Construction Limited (Respondent)

1842-87-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 800 (Applicant) v. Levert & Associates Contracting (Respondent)

1932-87-R: International Union of Operating Engineers, Local 793 (Applicant) v. T. P. Crawford Ltd. (Respondent)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

3033-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. Union Interlocking Stone Inc., Interlocking Paving Products Inc. (Respondent) (*Withdrawn*)

3547-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. Mason Windows Limited, and Dundas Woodwindows & Specialties Inc. (Respondents) (*Withdrawn*)

1045-87-R: United Brotherhood of Carpenters & Joiners of America, Local 1256 (Applicant) v. Ray Bigras Drywall & Acoustics Ltd., L & R Bigras Holding Limited, and Ray Bigras Drywall (Respondents) (*Granted*)

1128-87-R: Labourers' International Union of North America, Local 183 (Applicant) v. Country Homes (King) Limited, New House Investments, Jomaco Inc. (Respondents) (*Dismissed*)

1631-87-R; 1632-87-R: United Food & Commercial Workers, Local 175 (Applicant) v. Temvest Incorporated, c.o.b. as Temelini's Supermarket (Respondent) (*Dismissed*)

SALE OF A BUSINESS

1799-86-R: Labourer's International Union of North America, Local 1081 (Applicant) v. Thomas Construction (Galt) Limited, and Galtcam Construction Inc. (Respondents) (*Granted*)

3033-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. Union Interlocking Stone Inc., Interlocking Paving Products Inc. (Respondent) (*Withdrawn*)

3547-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. Mason Windows Limited, and Dundas Woodwindows & Specialties Inc. (Respondents) (*Withdrawn*)

1631-87-R; 1632-87-R: United Food & Commercial Workers Union, Local 175 (Applicant) v. Temvest Incorporated, c.o.b. as Temelini's Supermarket (Respondent) (*Dismissed*)

UNION SUCCESSOR RIGHTS

1174-87-R: United Steelworkers of America (Applicant) v. Vulcan-Hart Canada, division of Premark F.E.G. Canada Inc. (Respondent) (*Granted*)

1497-87-R: United Food & Commercial Workers International Union, Local 326W (Applicant) v. Campeau Corporation (Respondent) (*Withdrawn*)

1498-87-R: United Food & Commercial Workers International Union, Local 326W (Applicant) v. Uniflex Packaging of Canada Limited (Respondent) (*Withdrawn*)

1504-87-R: United Food & Commercial Workers International Union, Local 388W (Applicant) v. Coca-Cola Ltd. (Respondent) (*Granted*)

1506-87-R: United Food & Commercial Workers International Union, Local 381W (Applicant) v. Coca-Cola Ltd. (Respondent) (*Granted*)

1507-87-R; 1508-87-R: United Food & Commercial Workers International Union, Local 278W (Applicant) v. Coca-Cola Ltd. (Respondent) (*Granted*)

1518-87-R: United Food & Commercial Workers International Union, Local 504W (Applicant) v. Bill Thompson Transport Limited, St. Thomas, Ontario (Respondent) (*Withdrawn*)

1520-87-R: United Food & Commercial Workers International Union, Local 329W (Applicant) v. Campeau Corporation (Respondent) (*Withdrawn*)

1521-87-R: United Food & Commercial Workers International Union, Local 505W (Applicant) v. J. K. Stockwell Limited (Respondent) (*Withdrawn*)

1523-87-R: United Food & Commercial Workers International Union, Local 205W (Applicant) v. Glengarry Transport Limited (Respondent) (*Withdrawn*)

1528-87-R: United Food & Commercial Workers International Union, Locals 502W & 503W (Applicants) v. Frederick Transport Limited (Respondent) (*Withdrawn*)

1531-87-R: United Food & Commercial Workers International Union, Local 383W (Applicant) v. Coca-Cola Ltd. (Respondent) (*Granted*)

1537-87-R: United Food & Commercial Workers International Union, Local 384W (Applicant) v. Coca-Cola Ltd. (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

3201-86-R: Brigitte Fournier & Jocelyn Lacroix, on behalf of a group of employees of Hawkesbury Villa (Applicant) v. Canadian Union of Public Employees, Local 2904 (Respondent) v. Hawkesbury Villa (Intervener) (*Dismissed*)

0067-87-R: David J. Armstrong (Applicant) v. Energy & Chemical Workers Union, Local 9670B (Respondent) (*Withdrawn*)

0377-87-R: Leonardo Delprete, Raphael Lewis, Walter Mercsanits, et al. (Applicants) v. Shopmen's Local 834 of the International Association of Bridge, Structural & Ornamental Ironworkers (Respondent) v. Connie Steel Products Limited (Intervener) (*Dismissed*)

0909-87-R: Wayne Thomas (Applicant) v. United Steelworkers of America (Respondent) v. Isolation Systems Limited (Employer) (*Withdrawn*)

116-87-R: Group of Employees (Applicant) v. Ontario Public Service Employees Union, Local 144 (Respondent) (*Granted*)

Unit: "all employees of St. Leonard's House, London, in the County of Middlesex, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (7 employees in unit)

Number of names of persons on list as originally prepared by employer		7
Number of persons who cast ballots	7	
Number of ballots marked in favour of respondent		2
Number of ballots marked against respondent		5

1264-87-R: Lee Woods (Applicant) v. London & District Service Workers' Union, Local 220 (Respondent) v. The London Soap Company Limited (Intervener) (*Granted*)

Unit: "all employees of London Soap Company Limited in London, Ontario, save and except supervisors, persons above the rank of supervisor, and office and clerical staff" (17 employees in unit)

Number of names of persons on list as originally prepared by employer		17
Number of persons who cast ballots	13	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		13

1382-87-R: Daniel Contant (Applicant) v. United Steelworkers of America (Respondent) v. Cashway Building Centres, division of Canadian Corporation Management Co. Ltd.) (Intervener) (4 employees in unit) (*Granted*)

1383-87-R: Greg Hummell (Applicant) v. United Steelworkers of America (Respondent) v. Cashway Building Centres (division of Canadian Corporation Management Co. Ltd.) (Intervener) (5 employees in unit) (*Granted*)

1387-87-R: Rheal Laverdiere (Applicant) v. United Steelworkers of America (Respondent) (5 employees in unit) (*Granted*)

1437-87-R: Willie Driscoll (Applicant) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), Local 252 (Respondent) (*Withdrawn*)

1480-87-R: Randy Johnston (Applicant) v. Energy & Chemical Workers Union, Local 9670 (Respondent) v. Servico Limited/Limtee (Intervener) (*Withdrawn*)

1673-87-R: Prima Jeanne Schwab (Applicant) v. United Food & Commercial Workers Union, Local 175 (formerly Local 206) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

0699-87-U: Labourers' International Union of North America, Local 506 (Applicant) v. United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46, Chris Thurrott, and Niagara Mechanical Contractors Limited (Respondents) (*Dismissed*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

3063-86-U: Betty Jean Luno (Complainant) v. Canadian Union of Public Employees, Local 1019, and The Lambton County Board of Education (Respondents) (*Withdrawn*)

3384-86-U: Kathy Shaw (Complainant) v. Canadian Union of Public Employees, Local 45 (Respondent) v. The Oshawa General Hospital (Intervener) (*Dismissed*)

3421-86-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. Unicell Limited (Respondent) (*Withdrawn*)

3482-86-U: United Steelworkers of America (Complainant) v. Bristol Metal Industries Ltd. (Respondent) (*Withdrawn*)

0010-87-U: International Union of Operating Engineers, Local 793 (Complainant) v. Carl L. Mallette, and Metropolitan Toronto Apartment Builders Association (Respondent) (*Withdrawn*)

0016-87-U: Willy Merhar (Complainant) v. Teamsters Union Local 938 (Respondent) v. Clarke Transport Canada Inc. (Intervener) (*Dismissed*)

0137-87-U: Arthur Botham (Complainant) v. International Brotherhood of Teamsters, Local 230 (Respondent) (*Withdrawn*)

0203-87-U: Office & Professional Employees International Union (Complainant) v. Italian Canadian Benevolent Corporation, and Vita Community Living Services (Respondent) (*Withdrawn*)

0204-87-U: Winston Alfonso Blair (Complainant) v. United Steelworkers of America (Respondent) v. Midas Canada Inc., and International Parts Manufacturing Limited (Intervenors) (*Dismissed*)

0359-87-U: United Food & Commercial Workers International Union, Local 1000A (Complainant) v. Cambridge Canadian Foods (Respondent) (*Withdrawn*)

0420-87-U: James E. Giroux (Complainant) v. United Steelworkers of America, Local 6500 (Respondent) (*Dismissed*)

0428-87-U: Laura Godin (Complainant) v. United Food & Commercial Workers Union, Local 409 (Respondent) (*Withdrawn*)

0483-87-U: Graphic Communications International Union, Local 500M (Complainant) v. Telfer Packaging Limited (Respondent) (*Withdrawn*)

0501-87-U: Southern Ontario Newspaper Guild, Local 87 The Newspaper Guild, AFL:CIO:CLC (Complainant) v. The Globe & Mail, division of Canadian Newspapers Company Limited (Respondent) (*Granted*)

0642-87-U: Ontario Nurses' Association (Complainant) v. Richmond Nursing Home (Respondent) (*Withdrawn*)

0664-87-U: United Food & Commercial Workers Union (Complainant) v. J.B. Foods Industries Inc. (Respondent) (*Withdrawn*)

0678-87-U: United Food & Commercial Workers Union, Local 1000A (Complainant) v. Cambridge Canadian Foods (Respondent) (*Withdrawn*)

0713-87-U: Great Lakes Fishermen & Allied Workers' Union (Complainant) v. Philcox & Elesley Fishery Ltd. (Respondent) (*Withdrawn*)

0835-87-U: Guy Lalonde (Complainant) v. Warehousemen, Transportation & General Workers' Union, Local 715, of the Retail, Wholesale & Department Store Union c/o Robin W. McArthur (Respondent) (*Withdrawn*)

0856-87-U: Canadian Union of Operating Engineers & General Workers, Local 101 (Complainant) v. TDL Woodtreating Limited (Respondent) (*Withdrawn*)

0866-87-U: United Brotherhood of Carpenters & Joiners of America, Local 27 (Complainant) v. Canadian Convention & Show Services Inc. (Respondent) v. Labourers' International Union of North America, Local 506 (Intervener) (*Withdrawn*)

0879-87-U: Labourers' International Union of North America, Local 527 (Complainant) v. Ottawa Structural Concrete Services Ltd. (Respondent) (*Withdrawn*)

0891-87-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. Griffiths Laboratories Limited (Respondent) (*Withdrawn*)

- 0897-87-U:** National Automobile, Aerospace & Agricultural Implement Workers Union Canada (CAW-Canada) (Complainant) v. VME Equipment of Canada Ltd. (Respondent) (*Withdrawn*)
- 0940-87-U:** Hotel & Restaurant Employees Union, Local 75 (Complainant) v. Westfort Hotel Ltd. (Respondent) (*Withdrawn*)
- 0970-87-U:** Ontario Public Service Employees Union (Complainant) v. Sheridan College of Applied Arts & Technology (Respondent) (*Withdrawn*)
- 1093-87-U:** Hotel & Restaurant Employees Union, Local 75 (Complainant) v. Westfort Hotels Ltd. (Respondent) (*Withdrawn*)
- 1115-87-U:** Labourers' International Union of North America, Ontario Provincial District Council (Complainant) v. Greenspoon Bros. Limited (Respondent) (*Withdrawn*)
- 1158-87-U:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) v. Advance Automotive Industries Inc. (Respondent) (*Withdrawn*)
- 1171-87-U:** United Food & Commercial Workers International Union (Complainant) v. Valley Bottling of Canada Ltd. (Respondent) (*Withdrawn*)
- 1192-87-U:** Liquor Control Board Employees' Union (Complainant) v. Fort Erie Duty Free Shoppe Ltd. (Respondent) (*Withdrawn*)
- 1297-87-U:** United Food & Commercial Workers International Union, Local 1000A (Complainant) v. Cambridge Canadian Foods (Respondent) (*Withdrawn*)
- 1309-87-U:** Anthony J. Wojnowski (Complainant) v. United Food & Commercial Workers International Union, Local 139 (Respondent) v. Hoffman Meats Inc. (M.C. Shaw) (Intervener) (*Withdrawn*)
- 1364-87-U:** National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. L.O.F. Glass of Canada Limited (Respondent) (*Withdrawn*)
- 1402-87-U:** Hazael Winston Henry (Complainant) v. Canadian Union of Brewery & General Workers, Local 325 (Respondent) (*Withdrawn*)
- 1432-87-U:** International Association of Bridge, Structural & Ornamental Ironworkers, Local 786 (Complainant) v. Pacific West Industrial Installation Ltd., Lydar Enterprises, and Emerald Lake Resources Inc. (Respondents) (*Withdrawn*)
- 1440-87-U; 1441-87-U; 1442-87-U:** Fraternite Inter-Provinciale des Ouvriers en Electricite (F.I.P.O.E.) (Complainant) v. Tannis Trading (Respondent) (*Withdrawn*)
- 1466-87-U:** Hotel & Restaurant Employees Union, Local 75 (Complainant) v. Westfort Hotel Ltd. (Respondent) (*Withdrawn*)
- 1470-87-U:** Edward E. Phillips (Complainant) v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 938 (Respondent) v. Cooney Haulage Ltd. (Intervener) (*Withdrawn*)
- 1471-87-U:** Energy & Chemical Workers Union, Local 819 (Complainant) v. Leco Inc. and Lecofilms, division of Tecsyn Canada Limited (Respondents) (*Withdrawn*)
- 1566-87-U:** United Brotherhood of Carpenters & Joiners of America, Local 27 (Complainant) v. Labourers International Union of North America, Local 183, and Bramalea Ltd. (Respondents) (*Withdrawn*)
- 1577-87-U:** Retail, Wholesale & Department Store Union, Local 414, AFL:CIO:CLC (Complainant) v. 599872 Ontario Inc., c.o.b. as Mr. Grocer (Respondent) (*Withdrawn*)

1592-87-U: Tim Smith (Complainant) v. Toronto Joint Board, Amalgamated Clothing & Textile Workers, Local 14J (Respondent) (*Withdrawn*)

1604-87-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. Cuddy Food Products Ltd. (Respondent) (*Withdrawn*)

1626-87-U: Canadian Union of Public Employees, Local 2863 (Complainant) v. Willows Estates Nursing Home (Respondent) (*Withdrawn*)

1646-87-U: Connie Gassi (Complainant) v. United Food & Commercial Workers International Union, Locals 175 & 633 (Respondents) (*Withdrawn*)

1668-87-U: Philippe Richard Vincent (Complainant) v. Taxation Component of the Public Service Alliance of Canada (Respondent) (*Dismissed*)

1677-87-U: International Ladies Garment Workers' Union (Complainant) v. The Great Sewing Exchange Inc. (Respondent) (*Withdrawn*)

1690-87-U: Windsor (Ont.) Mouldmakers Union, Local 1680 (CLC) (Complainant) v. Laval Tool & Mould Ltd. (Respondent) (*Withdrawn*)

1697-87-U: Service Employees Union, Local 210 (Complainant) v. Dor Bar Ltd., c.o.b. as Borics Family Haircare Centre, and Robert Jones (Respondents) (*Withdrawn*)

1706-87-U: Service Employees International Union, Local 183 (Complainant) v. Edward Street Manor Nursing Home (Respondent) (*Withdrawn*)

1737-87-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. Cuddy Food Products Ltd. (Respondent) (*Withdrawn*)

1738-87-U: International Brotherhood of Electrical Workers, Local 636 (Complainant) v. Welland Hydro Electric Commission (Respondent) (*Withdrawn*)

1761-87-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. Colonial Furniture Co. (Ottawa) Ltd. (Respondent) (*Withdrawn*)

1773-87-U: Kazimir Cigan (Complainant) v. Canadian Autoworkers Union, Local 444 (Respondent) (*Dismissed*)

1787-87-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. VME Equipment of Canada Ltd. (Respondent) (*Withdrawn*)

1805-87-U: Cynthia Brown (Complainant) v. Kennedy Lodge Nursing Home (Respondent) (*Dismissed*)

1834-87-U: Tim Garrison (Complainant) v. The United Brotherhood of Carpenters & Joiners of America, Local 1030 (Respondent) (*Withdrawn*)

1943-87-U: Losereit Sales & Services Limited (Respondent) v. United Brotherhood of Carpenters & Joiners of America, Local 18 (Respondent) (*Dismissed*)

1972-87-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. Cuddy Food Products Limited (Respondent) (*Withdrawn*)

1973-87-U: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Complainant) v. Cuddy Foods Products Limited (Respondent) (*Withdrawn*)

2003-87-U: Kathleen McGhee (Complainant) v. Confederation Life, Anthes Universal, and Graphic Communication International Union (Respondents) (*Dismissed*)

2233-87-U: Canadian Union of Public Employees, Local 1334 (Complainant) v. University of Guelph (Respondent) (*Dismissed*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

1602-87-M; 1603-87-M: Chatsworth Nursing Home (Employer) and Christian Labour Association of Canada (Trade Union) (*Granted*)

FINANCIAL STATEMENT

1169-87-M: Tony Hoosain (Complainant) v. District Council, United Brotherhood of Carpenters & Joiners of America, (Respondent) (*Withdrawn*)

1170-87-M: Tony Hoosain (Complainant) v. United Brotherhood of Carpenters & Joiners of America, Local 27 (Respondent) (*Withdrawn*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

1444-86-M: Metropolitan Toronto Library (Applicant) v. Canadian Union of Public Employees, Local 1806 (Respondent) (*Withdrawn*)

1842-86-M: Baycrest Centre for Geriatric Care (Applicant) v. Ontario Public Service Employees Union (Respondent) (*Dismissed*)

2576-86-M: The Corporation of the City of Barrie (Applicant) v. Canadian Union of Public Employees, Local 2380 (Respondent) (*Granted*)

0197-87-M: Canadian Union of Public Employees, Local 2276 (Applicant) v. Peace Bridge Area Association for the Mentally Retarded (Respondent) (*Dismissed*)

1197-87-M: Ontario Nurses' Association (Applicant) v. Metro Windsor Essex County Health Unit (Respondent) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH & SAFETY ACT

3483-86-OH: Don Gilbert (Complainant) v. Bristol Metal Industries Ltd. (Respondent) (*Withdrawn*)

0514-87-OH: Scott McGron (Complainant) v. Nordican Board Company Inc., Jack Bysby, Ron Zweep and Cal Lucas (Respondents) (*Withdrawn*)

0755-87-OH: Diane Maltby (Complainant) v. ACF Grew Inc. (Respondent) (*Withdrawn*)

1198-87-OH: Garry F. Gray (Complainant) v. William Murray (Respondent) (*Withdrawn*)

1229-87-OH: Romano E. Masotti (Complainant) v. Bradscot Construction Ltd. (Respondent) (*Withdrawn*)

1579-87-OH: Dianne Phillips (Complainant) v. Emco Ltd. (Respondent) (*Withdrawn*)

1725-87-OH: Jaime Mota (Complainant) v. Doctor's Hospital Management (Respondent) (*Dismissed*)

CONSTRUCTION INDUSTRY GRIEVANCES

2669-86-M: International Association of Bridge, Structural & Ornamental Ironworkers, Local 700 (Applicant) v. Donald Morris, c.o.b. as Advance Welding & Fabrication (Respondent) (*Granted*)

3383-86-M: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Lodge 128 (Applicant) v. Hankin Environmental Systems Inc. (Respondent) (*Granted*)

0012-87-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 628 (Applicant) v. Precision Service & Engineering Limited (Respondent) (*Withdrawn*)

0128-87-G; 1029-87-G; 1810-87-G: International Brotherhood of Painters & Allied Trades, Locals 1795 & 1819 (Applicants) v. Walpat Glass & Aluminum Products Ltd., and M & I Aluminum Ltd. (Respondents) (*Granted*)

0283-87-M: Algoma District Homes for the Aged (F.J. Davey Home for the Aged) (Applicant) v. Ontario Nurses' Association (Respondent) (*Withdrawn*)

0515-87-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Rainbow Engineering Inc., c.o.b. as Rainbow Engineering (Respondent) (*Granted*)

0519-87-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 628 (Applicant) v. Precision Service & Engineering Limited (Respondent) (*Withdrawn*)

1029-87-G; 1030-87-G; 1031-87-G: Labourers' International Union of North America, Local 183 (Applicant) v. Macwall Forming Inc., and Residential Low-Rise Forming Contractors Association of Metropolitan Toronto & Vicinity (Respondents) (*Withdrawn*)

1124-87-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Markville Electric Co. Ltd. (Respondent) (*Withdrawn*)

1178-87-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 800 (Applicant) v. Canmech Mechanical (Respondent) (*Granted*)

1222-87-G: Lake Ontario District Council, United Brotherhood of Carpenters & Joiners of America (Applicant) v. Rosscor General Contractors (Respondent) (*Withdrawn*)

1279-87-G: Toronto-Central Ontario Building & Construction Trades Council, and International Union of Bricklayers & Allied Craftsmen, Local 2 (Applicants) v. Mastercraft Bridge & Engineering Construction (Ottawa) Limited (Respondent) (*Withdrawn*)

1350-87-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Ellis-Don Limited (Respondent) (*Withdrawn*)

1416-87-G: International Association of Bridge, Structural & Ornamental Iron Workers, Local 786 (Applicant) v. Peterborough Reinforcing Ltd. (Respondent) (*Withdrawn*)

1450-87-G: United Brotherhood of Carpenters & Joiners of America, Local 1988 (Applicant) v. Orlando Corporation (Respondent) (*Withdrawn*)

1555-87-G: International Brotherhood of Painters & Allied Trades, Local 200, and Ontario Council of the International Brotherhood of Painters & Allied Trades (Applicants) v. Neudorf Glass Industries Limited (Respondent) (*Granted*)

1573-87-G: Toronto-Central Ontario Building & Construction Trades Council, and International Union of Bricklayers & Allied Craftsmen, Local 2 (Applicants) v. Napev Construction Limited (Respondent) (*Withdrawn*)

1581-87-G: United Steelworkers of America (Applicant) v. Liquid Carbonic Inc. (Respondent) (*Withdrawn*)

1595-87-G: Operative Plasterers & Cements Masons International Association, Local 172 (Applicant) v. Hogan Restoration Ltd. (Respondent) (*Granted*)

1622-87-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Division Construction Ltd. (Respondent) (*Withdrawn*)

1623-87-G: International Union of Operating Engineers, Local 793 (Applicant) v. V.M.C. Rentals (Respondent) (*Granted*)

1663-87-G: Labourers' International Union of North America, Local 183 (Applicant) v. Pineridge Construction (1986) Ltd. (Respondent) (*Granted*)

1675-87-G: Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen (Applicant) v. Hoogsteen Bros. Masonry (Respondent) (*Withdrawn*)

1684-87-G: Resilient Floorworkers, Local 2965 (Applicant) v. Wentworth Tile & Terrazzo Ltd. (Respondent) (*Withdrawn*)

1685-87-G: Resilient Floorworkers, Local 2965 (Applicant) v. Sullivan Marble & Tile Co. Ltd. (Respondent) (*Granted*)

1709-87-G: Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen (Applicant) v. Farr Acidproofing & Refractories Ltd. (Respondent) (*Granted*)

1719-87-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 736 (Applicant) v. Canal Constructors Ltd. (Respondent) (*Withdrawn*)

1720-87-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 736 (Applicant) v. Canal Constructors Ltd. (Respondent) (*Withdrawn*)

1748-87-G: Labourers' Ontario Provincial District Council, Local 506 (Applicant) v. Tiger Wrecking Ltd. (Respondent) (*Withdrawn*)

1750-87-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 721 (Applicant) v. Cejoan Steel Erection Limited (Respondent) (*Withdrawn*)

1792-87-G: Teamsters Union Local 91 (Applicant) v. Dufresne Piling Company (1967) Ltd. (Respondent) (*Withdrawn*)

1812-87-G: Drywall, Acoustic, Lathing & Insulation Local 675, of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Alstate Drywall Systems Limited (Respondent) (*Withdrawn*)

1813-87-G: Drywall, Acoustic, Lathing & Insulation Local 675, of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. DFN Drywall & Acoustics Ltd. (Respondent) (*Withdrawn*)

1814-87-G: Drywall, Acoustic, Lathing & Insulation Local 675, of the United Brotherhood of Carpenters & Joiners of America (Applicant) v. Nap Mon Construction Limited (Respondent) (*Withdrawn*)

1817-87-G: Labourers' International Union of North America, Local 183 (Applicant) v. Rockwell Concrete Forming Specialists Inc. (Respondent) (*Withdrawn*)

1819-87-G: Labourers' International Union of North America, Local 183 (Applicant) v. Pachino Construction Company Limited (Respondent) (*Withdrawn*)

1820-87-G: Labourers' International Union of North America, Local 183 (Applicant) v. Tony Dimonte Drainage Ltd. (Respondent) (*Withdrawn*)

1821-87-G: Labourers' International Union of North America, Local 183 (Applicant) v. Aberdeen Highlands Construction Ltd. (Respondent) (*Withdrawn*)

1845-87-G: Christian Labour Association of Canada (Applicant) v. Upper Canada Glass (Respondent) (*Withdrawn*)

1860-87-G: Labourers' International Union of North America, Local 1059, and Ontario Provincial District Council (Applicants) v. Ontario Hydro, and Electrical Power Systems Construction Association (Respondent) (*Withdrawn*)

1910-87-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Lavern Asmusen Inc. (Respondent) (*Withdrawn*)

1911-87-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Helmut Kruschat Construction (Respondent) (*Withdrawn*)

1930-87-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Agrigento Group, division of 672259 Ontario Ltd. (Respondent) (*Withdrawn*)

1936-87-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Canmech Mechanical Contractors Limited (Respondent) (*Withdrawn*)

1947-87-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Nortown Plumbing Ltd. (Respondent) (*Withdrawn*)

1971-87-G: United Association of Journeymen & Apprentices of the Pipefitting Industry of the United States & Canada, Local 787 (Applicant) v. Air Kool Limited (Respondent) (*Withdrawn*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

2494-85-R: United Brotherhood of Carpenters & Joiners of America, Local 494 (Applicant) v. Scofan Contractors Limited, North Span Construction Inc., and Genus Corporation Ltd. (Respondents) (*Withdrawn*)

2372-86-R: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. VME Equipment of Canada Ltd. (Respondent) v. Group of Employees (Objectors) (*Dismissed*)

2424-86-M: International Union of Operating Engineers (Applicant) v. Newcan Mechanical Limited (Respondent) (*Dismissed*)

0877-87-R: Labourers' International Union of North America, Local 1936 (Applicant) v. The Corporation of the City of Sault Ste. Marie (Respondent) v. R.E. Morcan, CUPE National Representative, on behalf of Local 3, Canadian Union of Public Employees (Intervener #1) v. United Brotherhood of Carpenters and Joiners of America, Local 446 (Intervener #2) (*Dismissed*)

1574-87-R: Ironworkers District Council of Ontario (Applicant) v. A. Reisman Construction Ltd. (Respondent) (*Dismissed*)

*Ontario Labour Relations Board,
400 University Avenue,
Toronto, Ontario
M7A 1V4*

ISSN 0383-4778

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ONTARIO LABOUR RELATIONS BOARD REPORTS

December 1987



Ontario

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**A Monthly Series of Decisions from the
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Cited [1987] OLRB REP. DECEMBER

EDITOR: COLLEEN EDWARDS

Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.

Typeset, Printed and Bound by Union Labour in Ontario

CASES REPORTED

1.	Alma College; Re O.S.S.T.F.	1453
2.	Catalytic Maintenance Inc.; Re L.I.U.N.A., Local 1089	1479
3.	Corecon Construction Limited; Re C.J.A., Local 27; Re Employees of Corecon Construction.....	1480
4.	County Electric of Peterborough Limited; Re I.B.E.W., Local 894; Re Group of Employees	1485
5.	Craddock, John, et al.; Re U.A., Local 527	1488
6.	H & D Construction, Mancheneel Investments Limited c.o.b. as, and MIHU Holdings Limited; Re I.U.O.E., Local 793; Re L.I.U.N.A., Local 183.....	1495
7.	Habib, Joseph E.; Re General Motors of Canada Limited; Re U.A.W., Local 1973.....	1501
8.	Harnden & King Construction Ltd.; Re. I.U.O.E., Local 793; Re Group of Employees	1510
9.	Hoosain, Tony; Re District Council C.J.A.; Re C.J.A., Local 27.....	1513
10.	Huntsville I.G.A.; Re Cecil DeHaan; Re U.F.C.W., Locals 633 and 175.....	1517
11.	Huron Steel Fabricators (London) Limited; Re Paul Petrus; Re C.J.A., Local 3054.....	1522
12.	Knob Hill Farms Limited; Re U.F.C.W., Local 206; Re Group of Employees	1531
13.	Ledcor Industries Ltd. and Castonguay Blasting Ltd.; Re L.I.U.N.A., Local 607	1554
14.	Lumber and Sawmill Workers' Union, Local 2693 of the C.J.A.; Re L.I.U.N.A., Ontario Provincial District Council; Re L.I.U.N.A., Local 607; Re C.J.A., Ontario Provincial Council; Re Ontario Provincial Conference of the B.A.C.; Re I.U.O.E., Local 793; Re O.G.C.A.; Re Construction Association of Thunder Bay Inc.	1556
15.	MacMillan Bathurst Inc.; Re C.P.U., Local 1497, et al.	1568
16.	Madeleine Mines Ltd.; Re I.U.O.E., Local 793	1574
17.	Masstron Scale Ltd. and Toledo Scale Division of Reliance Electric Limited; Re I.A.M.	1578
18.	Ming Sun Holdings Inc.; Re L.I.U.N.A., Local 506	1585
19.	Ontario Hydro; Re The Society of Ontario Hydro Professional and Administrative Employees; Re C.U.P.E. - C.L.C. Ontario Hydro Employees Union Local 1000; Re The Coalition to Stop the Certification of the Society, on behalf of certain objecting employees, and Tom Stevens	1589
20.	Ottawa Structural Concrete Services Ltd.; Re L.I.U.N.A., Local 527	1599
21.	Peel Board of Education, The; Re O.S.S.T.F.	1600
22.	Quaker Oats Company of Canada Limited, The; Re Quaker Oats Employees Independent Union (Cereals); Re U.F.C.W., Local 293	1602
23.	Royal Mattress Limited; Re U.F.C.W.	1605
24.	Strathroy Nursing Homes Limited; Re Joan Timothy; Re London and District Service Workers' Union, Local 220, S.E.I.U.	1606

25.	United Sawmill Limited; Re I.W.A.	1612
26.	Wire Rope Industries Ltd.; Re I.W.A.; Re Lumber and Sawmill Workers' Union, Local 2693 of the C.J.A.	1613

SUBJECT INDEX

Bargaining Rights - Evidence - Related Employer - Non-unionized company bought by unionized company - Board relying on extrinsic evidence of past practice to determine contours of applicant's existing bargaining rights - Board exercising discretion to issue one employer declaration and declaration that non-unionized company bound by the collective agreement between the applicant and the unionized company MASSTRON SCALE LTD. AND TOLEDO SCALE DIVISION OF RELIANCE ELECTRIC LIMITED; RE I.A.M.	1578
Bargaining Unit - Certification - Applicant challenging the inclusion of three employees in the unit - Employees on the list of employees who were at work in the bargaining unit in another application on the application date - Employee can only be in one bargaining unit at the time the application is made - Board finding implicit agreement that employees in other unit since no one challenged their inclusion on that list HARNDEN & KING CONSTRUCTION LTD.; RE I.U.O.E., LOCAL 793; RE GROUP OF EMPLOYEES	1510
Bargaining Unit - Certification - Appropriate to place secondary panel occasional teachers in a separate bargaining unit from elementary panel occasional teachers - Degree of interchange between the two panels and fragmentation of workforce factors to be considered - Certificate issuing PEEL BOARD OF EDUCATION, THE; RE O.S.S.T.F.	1600
Bargaining Unit - Certification - Collective Agreement - Timeliness - Whether collective agreement in existence so as to render certification application untimely - Incumbent union having given timely notice to bargain - Collective agreement expiring - Certification application timely - Only one employee in office unit - Board departing from practice of separating office and plant units WIRE ROPE INDUSTRIES LTD.; RE I.W.A.; RE LUMBER AND SAWMILL WORKERS' UNION, LOCAL 2693 OF THE C.J.A.	1613
Bargaining Unit - Certification - Construction Industry - Whether any of the respondent's employees employed in the unit on the application date - Respondent's argument that the work of operating the hoists on the project was not the work of the applicant's craft and therefore the performance of it would not have brought any of the respondent's employees within the scope of the unit, rejected - Person hired in violation of the intervener's agreement with the MTABA can be considered an employee of the respondent in a unit other than the one covered by that agreement - Certificates issuing H & D CONSTRUCTION, MANCHENEEL INVESTMENTS LIMITED C.O.B. AS, AND MIHU HOLDINGS LIMITED; RE I.U.O.E., LOCAL 793; RE L.I.U.N.A., LOCAL 183	1495
Bargaining Unit - Certification - Construction Industry - Whether persons employed to clean up scrap material in apartment building performing work of construction labourers - Clean up of scrap material that at one time may have been left over from construction work and clean up not done with reference to any specific renovation work not the work of construction labourers - Persons excluded from unit - Certificates issuing MING SUN HOLDINGS INC.; RE L.I.U.N.A., LOCAL 506	1585
Bargaining Unit - Certification - Pre-Hearing Vote - Parties not in agreement on the description of the appropriate bargaining unit before the vote was conducted - No one requesting a	

II

hearing after vote - Board disposing of application on the material before it without conducting a hearing - Board adopting description of voting constituency as the appropriate bargaining unit

UNITED SAWMILL LIMITED; RE I.W.A. 1612

Bargaining Unit - Termination - Challenge to list of employees filed by the employer on the basis that the three individuals in question could not have performed any bargaining unit work but for the employer's violation of the collective agreement - Three individuals not having status as bargaining unit employees and therefore not properly on the employee list - Application dismissed

CORECON CONSTRUCTION LIMITED; RE C.J.A., LOCAL 27; RE EMPLOYEES OF CORECON CONSTRUCTION 1480

Certification - Bargaining Unit - Applicant challenging the inclusion of three employees in the unit - Employees on the list of employees who were at work in the bargaining unit in another application on the application date - Employee can only be in one bargaining unit at the time the application is made - Board finding implicit agreement that employees in other unit since no one challenged their inclusion on that list

HARDEN & KING CONSTRUCTION LTD.; RE I.U.O.E. LOCAL 793; RE GROUP OF EMPLOYEES 1510

Certification - Bargaining Unit - Appropriate to place secondary panel occasional teachers in a separate bargaining unit from elementary panel occasional teachers - Degree of interchange between the two panels and fragmentation of workforce factors to be considered - Certificate issuing

PEEL BOARD OF EDUCATION, THE; RE O.S.S.T.F. 1600

Certification - Bargaining Unit - Collective Agreement - Timeliness - Whether collective agreement in existence so as to render certification application untimely - Incumbent union having given timely notice to bargain - Collective agreement expiring - Certification application timely - Only one employee in office unit - Board departing from practice of separating office and plant units

WIRE ROPE INDUSTRIES LTD.; RE I.W.A.; RE LUMBER AND SAWMILL WORKERS' UNION, LOCAL 2693 OF THE C.J.A. 1613

Certification - Bargaining Unit - Construction Industry - Whether any of the respondent's employees employed in the unit on the application date - Respondent's argument that the work of operating the hoists on the project was not the work of the applicant's craft and therefore the performance of it would not have brought any of the respondent's employees within the scope of the unit, rejected - Person hired in violation of the intervener's agreement with the MTABA can be considered an employee of the respondent in a unit other than the one covered by the agreement - Certificates issuing

H & D CONSTRUCTION, MANCHENEEL INVESTMENTS LIMITED C.O.B. AS, AND MIHU HOLDINGS LIMITED; RE I.U.O.E., LOCAL 793; RE L.I.U.N.A., LOCAL 183 1495

Certification - Bargaining Unit - Construction Industry - Whether persons employed to clean up scrap material in apartment building performing work of construction labourers - Clean up of scrap material that at one time may have been left over from construction work and clean up not done with reference to any specific renovation work not the work of construction labourers - Persons excluded from unit - Certificates issuing

MING SUN HOLDINGS INC.; RE L.I.U.N.A., LOCAL 506 1585

Certification - Bargaining Unit - Pre-Hearing Vote - Parties not in agreement on the description

of the appropriate bargaining unit before the vote was conducted - No one requesting a hearing after vote - Board disposing of application on the material before it without conducting a hearing - Board adopting description of voting constituency as the appropriate bargaining unit

UNITED SAWMILL LIMITED; RE I.W.A. 1612

Certification - Membership Evidence - Form 80 rejected in earlier certification application because proper inquiries had not been made by the Form 80 declarant - New Form 80's filed in this application - No grounds for barring this application - Earlier decision *res judicata* only with respect to the earlier Form 80 - Board prepared to rely on the evidence of membership and the new Form 80's - Certificates issuing

COUNTY ELECTRIC OF PETERBOROUGH LIMITED; RE I.E.B.E.W., LOCAL 894; RE GROUP OF EMPLOYEES 1485

Certification - Membership Evidence - Practice and Procedure - Parties executing minutes of settlement agreeing on all points except whether the Board should count membership cards signed by individuals after their last day worked - Parties' request for a hearing to make argument on that issue denied - No facts in dispute - More appropriate to receive written submissions

CATALYTIC MAINTENANCE INC.; RE L.I.U.N.A., LOCAL 1089 1479

Certification - Practice and Procedure - Pre-Hearing Vote - Reconsideration - Alleged transfer of bargaining rights between locals after certification application filed - Successor rights application concerning the transfer pending before the Board - Whether alleged successor local should be on the ballot

QUAKER OATS COMPANY OF CANADA LIMITED, THE; RE QUAKER OATS EMPLOYEES INDEPENDENT UNION (CEREALS); RE U.F.C.W., LOCAL 293 1602

Certification - Pre-Hearing Vote - Whether Board should deny request for pre-hearing vote due to complexity of bargaining unit issues involved - Pre-hearing vote denied due to applicant's position that it already had bargaining rights - Pre-hearing vote provisions analyzed

ONTARIO HYDRO; RE THE SOCIETY OF ONTARIO HYDRO PROFESSIONAL AND ADMINISTRATIVE EMPLOYEES; RE C.U.P.E. - C.L.C. ONTARIO HYDRO EMPLOYEES UNION LOCAL 1000; RE THE COALITION TO STOP THE CERTIFICATION OF THE SOCIETY, ON BEHALF OF CERTAIN OBJECTING EMPLOYEES, AND TOM STEVENS 1589

Certification Where Act Contravened - Charter of Rights and Freedoms - Unfair Labour Practice - Layoff and intimidation of employees, and granting of wage increases constituting unfair labour practices - Letter to employees from president of company proper exercise of employer free speech - Reverse onus not contrary to Charter - Petition rejected - First contract legislation not altering section 8 jurisprudence - Certificate issuing - Unnecessary for union to call every grievor as a witness - All laid-off employees reinstated with compensation

KNOB HILL FARMS LIMITED; RE U.F.C.W., LOCAL 206; RE GROUP OF EMPLOYEES 1531

Charter of Rights and Freedoms - Certification Where Act Contravened - Unfair Labour Practice - Layoff and intimidation of employees, and granting of wage increases constituting unfair labour practices - Letter to employees from president of company proper exercise of employer free speech - Reverse onus not contrary to Charter - Petition rejected - First contract legislation not altering section 8 jurisprudence - Certificate issuing - Unnecessary for

IV

union to call every grievor as a witness - All laid-off employees reinstated with compensation	
NOB HILL FARMS LIMITED; RE U.F.C.W., LOCAL 206; RE GROUP OF EMPLOYEES	1531
Collective Agreement - Bargaining Unit - Certification - Timeliness - Whether collective agreement in existence so as to render certification application untimely - Incumbent union having given timely notice to bargain - Collective agreement expiring - Certification application timely - Only one employee in office unit - Board departing from practice of separating office and plant units	
WIRE ROPE INDUSTRIES LTD.; RE I.W.A.; RE LUMBER AND SAWMILL WORKERS' UNION, LOCAL 2693 OF THE C.J.A.	1613
Construction Industry - Bargaining Unit - Certification - Whether any of the respondent's employees employed in the unit on the application date - Respondent's argument that the work of operating the hoists on the project was not the work of the applicant's craft and therefore the performance of it would not have brought any of the respondent's employees within the scope of the unit, rejected - Person hired in violation of the intervener's agreement with the MTABA can be considered an employee of the respondent in a unit other than the one covered by that agreement - Certificates issuing	
H & D Construction, Mancheneel Investments Limited c.o.b. as, and MIHU Holdings Limited; Re I.U.O.E., Local 793; Re L.I.U.N.A., Local 183.....	1495
Construction Industry - Bargaining Unit - Certification - Whether persons employed to clean up scrap material in apartment building performing work of construction labourers - Clean up of scrap material that at one time may have been left over from construction work and clean up not done with reference to any specific renovation work not the work of construction labourers - Persons excluded from unit - Certificates issuing	
MING SUN HOLDINGS INC.; RE L.I.U.N.A., LOCAL 506	1585
Construction Industry - Reference - Whether Minister should issue new designation orders and/or amend existing designation orders to permit union local to lawfully represent workers in the ICI sector of the construction industry	
LUMBER AND SAWMILL WORKERS' UNION, LOCAL 2693 OF THE C.J.A.; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL; RE ONTARIO PROVINCIAL CONFERENCE OF THE B.A.C.; RE I.U.O.E., LOCAL 793; RE O.G.C.A.; RE CONSTRUCTION ASSOCIATION OF THUNDER BAY INC.	1556
Duty of Fair Referral - Duty of Fair Representation - Intimidation and Coercion - Unfair Labour Practice - Union revoking permission granted complainants to work at Hydro - Complainants refusing to pay fines imposed for continuing to work - Union refusing to refer complainants out of hiring hall - Complaint of unfair labour practices dismissed	
CRADDOCK, JOHN, ET AL.; RE U.A., LOCAL 527.....	1488
Duty of Fair Representation - Duty of Fair Referral - Intimidation and Coercion - Unfair Labour Practice - Union revoking permission granted complainants to work at Hydro - Complainants refusing to pay fines imposed for continuing to work - Union refusing to refer complainants out of hiring hall - Complaint of unfair labour practices dismissed	
CRADDOCK, JOHN, ET AL.; RE U.A., LOCAL 527.....	1488
Duty of Fair Representation - Practice and Procedure - Unfair Labour Practice - Employer asking that it be named as an intervener rather than as a respondent - Board finding it desirable	

that employer be named as a respondent in a duty of fair representation complaint - No breach of duty by union in refusing to take complainant's discharge grievance to arbitration	
HABIB, JOSEPH E.; RE GENERAL MOTORS OF CANADA LIMITED; RE U.A.W., LOCAL 1973.....	1501
Employee Reference - Employee terminated for alleged theft one month prior to application under s.106(2) - Applicant's submission that Board ought to determine person's duties as of the date of filing of the application for certification rejected - Officer's appointment cancelled - Matter adjourned <i>sine die</i>	
ROYAL MATTRESS LIMITED; RE U.F.C.W.	1605
Evidence - Bargaining Rights - Related Employer - Non-unionized company bought by unionized company - Board relying on extrinsic evidence of past practice to determine contours of applicant's existing bargaining rights - Board exercising discretion to issue one employer declaration and declaration that non-unionized company bound by the collective agreement between the applicant and the unionized company	
MASSTRON SCALE LTD. AND TOLEDO SCALE DIVISION OF RELIANCE ELECTRIC LIMITED; RE I.A.M.	1578
Financial Statement - Reconsideration - Settlement - Financial statements prepared by certified general accountant provided to complainant pursuant to minutes of settlement - Complainant attempting to "re-open" complaint on the basis that statements must be prepared by a chartered accountant - Audited financial statement need not be prepared by a person licensed under the <i>Public Accountancy Act</i> unless Board so directs - Party not permitted to resile from settlement - Request to reconsider complaint rejected	
HOOSAIN, TONY; RE DISTRICT COUNCIL C.J.A.; RE C.J.A., LOCAL 27	1513
First Contract Arbitration - Union unable to reach collective agreement with financially troubled private boarding school - Whether school had adopted an uncompromising bargaining position regarding management rights, seniority, layoffs, and related issues - School attempting to bring itself into line with its competitors - Application dismissed	
ALMA COLLEGE; RE O.S.S.T.F.	1453
Intimidation and Coercion - Duty of Fair Referral - Duty of Fair Representation - Unfair Labour Practice - Union revoking permission granted complainants to work at Hydro - Complainants refusing to pay fines imposed for continuing to work - Union refusing to refer complainants out of hiring hall - Complaint of unfair labour practices dismissed	
CRADDOCK, JOHN, ET AL.; RE U.A., LOCAL 527.....	1488
Membership Evidence - Certification - Form 80 rejected in earlier certification application because proper inquiries had not been made by the Form 80 declarant - New Form 80's filed in this application - No grounds for barring this application - Earlier decision <i>res judicata</i> only with respect to the earlier Form 80 - Board prepared to rely on the evidence of membership and the new Form 80's - Certificates issuing	
COUNTY ELECTRIC OF PETERBOROUGH LIMITED; RE I.B.E.W., LOCAL 894; RE GROUP OF EMPLOYEES	1485
Membership Evidence - Certification - Practice and Procedure - Parties executing minutes of settlement agreeing on all points except whether the Board should count membership cards signed by individuals after their last day worked - Parties' request for a hearing to make argument on that issue denied - No facts in dispute - More appropriate to receive written submissions	
CATALYTIC MAINTENANCE INC.; RE L.I.U.N.A., LOCAL 1089.....	1479

VI

- Parties - Petition - Termination - Whether petitions should be rejected because they do not specifically identify the locals of the union affected by the application - Whether applicant can seek termination of bargaining rights in respect of three units when he is a member of only one unit - Local designation not significant to employees signing petitions - Employees found to have authorized applicant to file termination application on their behalf - Vote ordered
HUNTSVILLE I.G.A.; RE CECIL DEHAAN; RE U.F.C.W., LOCALS 633 AND 175 ... 1517
- Petition - Parties - Termination - Whether petitions should be rejected because they do not specifically identify the locals of the union affected by the application - Whether applicant can seek termination of bargaining rights in respect of three units when he is a member of only one unit - Local designation not significant to employees signing petitions - Employees found to have authorized applicant to file termination application on their behalf - Vote ordered
HUNTSVILLE I.G.A.; RE CECIL DEHAAN; RE U.F.C.W., LOCALS 633 AND 175 ... 1517
- Petition - Termination - All employees laid off shortly after certification - Breach of sections 70 and 79 but not 64 and 66 - Applicant receiving guidance on petition from previously employed superintendent - Majority finding petition voluntary - Board discussing distinction between a petition in a certification application and a petition in a termination application - Vote ordered
HURON STEEL FABRICATORS (LONDON) LIMITED; RE PAUL PETRUS; RE C.J.A., LOCAL 3054 1522
- Practice and Procedure - Certification - Membership Evidence - Parties executing minutes of settlement agreeing on all points except whether the Board should count membership cards signed by individuals after their last day worked - Parties' request for a hearing to make argument on that issue denied - No facts in dispute - More appropriate to receive written submissions
CATALYTIC MAINTENANCE INC.; RE L.I.U.N.A., LOCAL 1089 1479
- Practice and Procedure - Certification - Pre-Hearing Vote - Reconsideration - Alleged transfer of bargaining rights between locals after certification application filed - Successor rights application concerning the transfer pending before the Board - Whether alleged successor local should be on the ballot
QUAKER OATS COMPANY OF CANADA LIMITED, THE; RE QUAKER OATS EMPLOYEES INDEPENDENT UNION (CEREALS); RE U.F.C.W., LOCAL 293 1602
- Practice and Procedure - Duty of Fair Representation - Unfair Labour Practice - Employer asking that it be named as an intervener rather than as a respondent - Board finding it desirable that employer be named as a respondent in a duty of fair representation complaint - No breach of duty by union in refusing to take complainant's discharge grievance to arbitration
HABIB, JOSEPH E.; RE GENERAL MOTORS OF CANADA LIMITED; RE U.A.W., LOCAL 1973 1501
- Practice and Procedure - Related Employer - Sale of a Business - Board refusing to treat a letter as an application under sections 63/1(4) - Board's Rules requiring the filing of the proper forms to be complied with
OTTAWA STRUCTURAL CONCRETE SERVICES LTD.; RE L.I.U.N.A., LOCAL 527 1599
- Pre-Hearing Vote - Bargaining Unit - Certification - Parties not in agreement on the description of the appropriate bargaining unit before the vote was conducted - No one requesting a hearing after vote - Board disposing of application on the material before it without con-

ducting a hearing - Board adopting description of voting constituency as the appropriate bargaining unit

UNITED SAWMILL LIMITED; RE I.W.A. 1612

Pre-Hearing Vote - Certification - Practice and Procedure - Reconsideration - Alleged transfer of bargaining rights between locals after certification application filed - Successor rights application concerning the transfer pending before the Board - Whether alleged successor local should be on the ballot

QUAKER OATS COMPANY OF CANADA LIMITED, THE; RE QUAKER OATS EMPLOYEES INDEPENDENT UNION (CEREALS); RE U.F.C.W., LOCAL 293 1602

Pre-Hearing Vote - Certification - Whether Board should deny request for pre-hearing vote due to complexity of bargaining unit issues involved - Pre-hearing vote denied due to applicant's position that it already had bargaining rights - Pre-hearing vote provisions analyzed

ONTARIO HYDRO; RE THE SOCIETY OF ONTARIO HYDRO PROFESSIONAL AND ADMINISTRATIVE EMPLOYEES; RE C.U.P.E. - C.L.C. ONTARIO HYDRO EMPLOYEES UNION LOCAL 1000; RE THE COALITION TO STOP THE CERTIFICATION OF THE SOCIETY, ON BEHALF OF CERTAIN OBJECTING EMPLOYEES, AND TOM STEVENS 1589

Reconsideration - Certification - Practice and Procedure - Pre-Hearing Vote - Alleged transfer of bargaining rights between locals after certification application filed - Successor rights application concerning the transfer pending before the Board - Whether alleged successor local should be on the ballot

QUAKER OATS COMPANY OF CANADA LIMITED, THE; RE QUAKER OATS EMPLOYEES INDEPENDENT UNION (CEREALS); RE U.F.C.W., LOCAL 293 1602

Reconsideration - Financial Statement - Settlement - Financial statements prepared by certified general accountant provided to complainant pursuant to minutes of settlement - Complainant attempting to "re-open" complaint on the basis that statements must be prepared by a chartered accountant - Audited financial statement need not be prepared by a person licensed under the *Public Accountancy Act* unless Board so directs - Party not permitted to resile from settlement - Request to reconsider complaint rejected

HOOSAIN, TONY; RE DISTRICT COUNCIL C.J.A.; RE C.J.A., LOCAL 27 1513

Reference - Construction Industry - Whether Minister should issue new designation orders and/or amend existing designation orders to permit union local to lawfully represent workers in the ICI sector of the construction industry

LUMBER AND SAWMILL WORKERS' UNION, LOCAL 2693 OF THE C.J.A.; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL; RE L.I.U.N.A., LOCAL 607; RE C.J.A., ONTARIO PROVINCIAL COUNCIL; RE ONTARIO PROVINCIAL CONFERENCE OF THE B.A.C.; RE I.U.O.E., LOCAL 793; RE O.G.C.A.; RE CONSTRUCTION ASSOCIATION OF THUNDER BAY INC. 1556

Related Employer - Bargaining Rights - Evidence - Non-unionized company bought by unionized company - Board relying on extrinsic evidence of past practice to determine contours of applicant's existing bargaining rights - Board exercising discretion to issue one employer declaration and declaration that non-unionized company bound by the collective agreement between the applicant and the unionized company

MASSTRON SCALE LTD. AND TOLEDO SCALE DIVISION OF RELIANCE ELECTRIC LIMITED; RE I.A.M. 1578

Related Employer - Practice and Procedure - Sale of a Business - Board refusing to treat a letter

VIII

as an application under sections 63/1(4) - Board's Rules requiring the filing of the proper forms to be complied with	
OTTAWA STRUCTURAL CONCRETE SERVICES LTD.; RE L.I.U.N.A., LOCAL 527	1599
Representation Vote - Termination - Voter eligibility rules reviewed - Employee "on the payroll" in the sense of using up vacation entitlement and sick pay credits before formally retiring not eligible to vote - Fact that employee continued to have union dues deducted from pay not detracting from that conclusion - Applicant involved in a car accident and not able to vote - Board denying her another opportunity to vote - Ballots ordered counted	
STRATHROY NURSING HOMES LIMITED; RE JOAN TIMOTHY; RE LONDON AND DISTRICT SERVICE WORKERS' UNION, LOCAL 220, S.E.I.U.	1609
Right of Access - Board declining to restrict access of the applicant to days when representatives of another union which had already been given access were not on site	
LEDCOR INDUSTRIES LTD. AND CASTONGUAY BLASTING LTD.; RE L.I.U.N.A., LOCAL 607	1554
Right of Access - Terms of access order determined - Mere possibility of violence not a compelling reason to restrict access to bunkhouse - No reason to direct a more limited duration of the order than one year	
MADELEINE MINES LTD.; RE I.U.O.E., LOCAL 793	1574
Sale of a Business - Practice and Procedure - Related Employer - Board refusing to treat a letter as an application under sections 63/1(4) - Board's Rules requiring the filing of the proper forms to be complied with	
OTTAWA STRUCTURAL CONCRETE SERVICES LTD.; RE L.I.U.N.A., LOCAL 527	1599
Settlement - Financial Statement - Reconsideration - Financial Statements prepared by certified general accountant provided to complainant pursuant to minutes of settlement - Complainant attempting to "re-open" complaint on the basis that statements must be prepared by a chartered accountant - Audited financial statement need not be prepared by a person licensed under the <i>Public Accountancy Act</i> unless Board so directs - Party not permitted to resile from settlement - Request to reconsider complaint rejected	
HOOSAIN, TONY; RE DISTRICT COUNCIL C.J.A.; RE C.J.A., LOCAL 27	1513
Strike - Whether refusal of employees to work overtime constituting an illegal strike - History of employees declining to work overtime whenever there is a layoff - Union posting by-law restricting overtime whenever layoff begins - Board declining to decide whether strike - Board declining to exercise its discretion in favour of issuing a declaration or associated remedies	
MACMILLAN BATHURST INC.; RE C.P.U., LOCAL 1497, ET AL.	1568
Termination - Bargaining Unit - Challenge to list of employees filed by the employer on the basis that the three individuals in question could not have performed any bargaining unit work but for the employer's violation of the collective agreement - Three individuals not having status as bargaining unit employees and therefore not properly on the employee list - Application dismissed	
CORECON CONSTRUCTION LIMITED; RE C.J.A., LOCAL 27; RE EMPLOYEES OF CORECON CONSTRUCTION	1480
Termination - Parties - Petition - Whether petitions should be rejected because they do not specifically identify the locals of the union affected by the application - Whether applicant can	

seek termination of bargaining rights in respect of three units when he is a member of only one unit - Local designation not significant to employees signing petitions - Employees found to have authorized applicant to file termination application on their behalf - Vote ordered	
HUNTSVILLE I.G.A.; RE CECIL DEHAAN; RE U.F.C.W., LOCALS 633 AND 175 ...	1517
Termination - Petition - All employees laid off shortly after certification - Breach of sections 70 and 79 but not 64 and 66 - Applicant receiving guidance on petition from previously employed superintendent - Majority finding petition voluntary - Board discussing distinction between a petition in a certification application and a petition in a termination application - Vote ordered	
HURON STEEL FABRICATORS (LONDON) LIMITED; RE PAUL PETRUS; RE C.J.A. LOCAL 3054.....	1522
Termination - Representation Vote - Voter eligibility rules reviewed - Employee "on the payroll" in the sense of using up vacation entitlement and sick pay credits before formally retiring not eligible to vote - Fact that employee continued to have union dues deducted from pay not detracting from that conclusion - Applicant involved in a car accident and not able to vote - Board denying her another opportunity to vote - Ballots ordered counted	
STRATHROY NURSING HOMES LIMITED; RE JOAN TIMOTHY; RE LONDON AND DISTRICT SERVICE WORKERS' UNION, LOCAL 220, S.E.I.U.	1606
Timeliness - Bargaining Unit - Certification - Collective Agreement - Whether collective agreement in existence so as to render certification application untimely - Incumbent union having given timely notice to bargain - Collective agreement expiring - Certification application timely - Only one employee in office unit - Board departing from practice of separating office and plant units	
WIRE ROPE INDUSTRIES LTD.; RE I.W.A.; RE LUMBER AND SAWMILL WORKERS' UNION, LOCAL 2693 OF THE C.J.A.	1613
Unfair Labour Practice - Certification Where Act Contravened - Charter of Rights and Freedoms - Layoff and intimidation of employees, and granting of wage increases constituting unfair labour practices - Letter to employees from president of company proper exercise of employer free speech - Reverse onus not contrary to Charter - Petition rejected - First contract legislation not altering section 8 jurisprudence - Certificate issuing - Unnecessary for union to call every grievor as a witness - All laid-off employees reinstated with compensation	
KNOB HILL FARMS LIMITED; RE U.F.C.W., LOCAL 206; RE GROUP OF EMPLOYEES.....	1531
Unfair Labour Practice - Duty of Fair Referral - Duty of Fair Representation - Intimidation and Coercion - Union revoking permission granted complainants to work at Hydro - Complainants refusing to pay fines imposed for continuing to work - Union refusing to refer complainants out of hiring hall - Complaint of unfair labour practices dismissed	
CRADDOCK, JOHN, ET AL.; RE U.A., LOCAL 527.....	1488
Unfair Labour Practice - Duty of Fair Representation - Practice and Procedure - Employer asking that it be named as an intervener rather than as a respondent - Board finding it desirable that employer be named as a respondent in a duty of fair representation complaint - No breach of duty by union in refusing to take complainant's discharge grievance to arbitration	
HABIB, JOSEPH E.; RE GENERAL MOTORS OF CANADA LIMITED; RE U.A.W., LOCAL 1973.....	1501

1611-87-FC Ontario Secondary School Teachers' Federation, Applicant v. Alma College, Respondent

First Contract Arbitration - Union unable to reach collective agreement with financially troubled private boarding school - Whether school had adopted an uncompromising bargaining position regarding management rights, seniority, layoffs, and related issues - School attempting to bring itself into line with its competitors - Application dismissed

BEFORE: *Robert D. Howe*, Vice-Chair, and Board Members *R. J. Gallivan* and *R. R. Montague*.

APPEARANCES: *Maurice Green*, *Fred Birket*, *Elizabeth Jackson* and *Steven Prettie* for the applicant; *D. K. Gray* and *S. J. Shamie* for the respondent.

DECISION OF ROBERT D. HOWE, VICE-CHAIR, AND BOARD MEMBER R. J. GALLIVAN;
December 23, 1987

1. This is an application under section 40a of the *Labour Relations Act* for a direction that a first contract be settled by arbitration. The applicant contends that by not agreeing to meet more frequently, and by not providing its negotiating team with a proper mandate to negotiate, the respondent failed to make reasonable or expeditious efforts to conclude a collective agreement. The applicant also contends that the respondent has adopted, without reasonable justification, an uncompromising bargaining position in respect of management rights, seniority, layoffs, and related issues.

2. The application was filed with the Board on September 11, 1987, and was initially scheduled to be heard on September 21, 22, 23, and 24. The matter was subsequently scheduled to be heard on September 28 and 30, and October 1 and 2. A further rescheduling to November 12, 13, 16, and 24 occurred after the parties, through their respective counsel, agreed to waive the thirty-day time limit contained in section 40a(2) of the Act.

3. In making the findings of fact contained in this decision, the Board has carefully considered the oral evidence of the three witnesses who testified before us: Fred Birket, Stephen Shamie, and Thomas Storie. We have also considered the fifty exhibits which were entered during the course of these proceedings, and the inferences which may reasonably be drawn from the totality of the evidence.

4. The respondent (also referred to in this decision as the "College") is a private boarding school which has been in operation for over one hundred years in St. Thomas, Ontario. It is directed by a Board of Managers (the "Bd.") composed of unpaid volunteers. The College has been operating with a deficit for the last few years. During the 1986-87 school year, in which the College had an enrolment of 142 students, its accumulated deficit of \$206,981 increased by \$187,124 to produce an accumulated deficit of \$394,105 as of June 30, 1987. The 1986-87 deficit (of \$187,124) was the largest which the College has ever experienced. As of the date of this application, the College was forecasting a deficit of over \$450,000 for 1987-88, based upon an enrolment of approximately one hundred students. One of the factors which the College has identified as being a cause of that significant decline in enrolment is parents' concerns about the quality and standard of education at the College.

5. The applicant (also referred to in this decision as the "Federation") organized the respondent's teachers in the fall of 1986. In an unreported decision dated October 31, 1986 (in File No. 1866-86-R), another panel of the Board wrote, in part, as follows:

1. This is an application for certification in which the parties have reached agreement on all matters in dispute between them with the exception of the inclusion of the classification of vice-principal in the bargaining unit, and have further agreed to waive their right to a formal hearing in the matter.

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3. The parties have reached agreement on all aspects of the bargaining unit description with the exception of whether Lara Masur-Leitch, classified as a vice-principal, should be included in the bargaining unit. The respondent contends that she should be excluded on the basis that she exercises managerial functions within the meaning of section 1(3)(b) of the Act. In view of this dispute, a Board Officer is authorized to inquire into and report to the Board with respect to the duties and responsibilities of Lara Masur-Leitch classified as vice-principal.

4. The Board has determined, however, that the applicant's right to certification cannot be affected by the Board's ultimate decision as to the inclusion or exclusion of the vice-principal. On the basis of all the evidence before it, the Board is satisfied that in either event more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on October 15, 1986, the terminal date fixed for this application and the date which the Board determines under section 103(2)(j) of the *Labour Relations Act* to be the time for purposes of ascertaining membership under section 7(1) of the said Act.

5. Therefore, pursuant to its discretion under section 6(2) of the Act, and pending the final resolution of the composition of the bargaining unit, the Board certifies the applicant as bargaining agent for all teachers employed by the respondent in the City of St. Thomas, save and except Principal, Dean, Assistant Dean, Director of Music, teachers in the Nursery School, persons engaged on a contractual basis to teach music, Administrative staff and persons engaged in clerical and support functions and, pending the final determination of the matter in dispute, excluding as well the vice-principal.

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(For ease of exposition, the persons in that bargaining unit are referred to in this decision as the "teachers".) The parties subsequently agreed to adjourn *sine die* the Board Officer's examination regarding Ms. Masur-Leitch's duties and responsibilities.

6. In November of 1986, Mr. Birket was assigned by the Federation to assist the teachers' bargaining team in negotiations. Mr. Birket, who is currently attached to the Federation's collective bargaining cluster, has been involved in negotiating about fifteen collective agreements in various capacities, including President of District 14 of the Federation (from 1978 to 1980), District Negotiator (from 1981 to 1983), and Chief Metro Negotiator (from 1983 to 1986). He met with the teachers in late November or early December of 1986 to review with them a model collective agreement which he had drafted for use in negotiations pertaining to private schools. After a number of modifications had been made in response to concerns raised at that meeting, the teachers adopted the revised proposals as their initial bargaining position. Four teachers were selected to serve on the applicant's bargaining committee, along with Mr. Birket, who was to be the applicant's chief spokesperson.

7. On or about November 27, 1986, the Federation gave the College notice to bargain, pursuant to section 14 of the Act. The first negotiating meeting took place on December 8, 1986. There were five persons present at that meeting on behalf of the College, including Ms. Masur-Leitch (the aforementioned Vice-Principal of the College) and Marietta Roberts, who initially served as the College's chief spokesperson. Ms. Roberts is a lawyer who serves as the Chairperson of the College's Personnel Committee on a volunteer basis. After discussing and agreeing upon a number of "ground rules" for the negotiations, the applicant's bargaining committee tabled a pro-

posed collective agreement which included an expanded bargaining unit, a mandatory membership clause, a proposal that the President of the Alma Division of District 35 of the Federation be allowed to observe the meetings of the Bd. and that a bargaining unit member selected by the teachers sit as a voting member of the College's Personnel Committee, a salary grid with grid entries which were "85% of the corresponding grid entries in the collective agreement for the school year 1986-87 between District 35, O.S.S.T.F., and the Elgin County Board of Education", substantial improvements in fringe benefits, a "committee on common concerns", twenty days of sick leave credit per year (with accumulation to a maximum of 300 days), a maximum pupil teacher ratio of 9.9:1, and a number of "working rules", including the following:

3.1.0.0.0. TIMETABLES

3.1.1.0.0. A timetable showing all teaching and supervision assignments shall be provided to each employee no later than the beginning of the first teaching day in September.

3.1.2.0.0. A full-time teacher shall be assigned to teach a maximum of five (5) credits per year.

3.1.3.0.0. No employee shall be assigned more than 1050 minutes of teaching per week. This shall be prorated for part-time and overtime employees.

3.1.4.0.0. No employee shall be assigned more than 300 minutes of supervision per week. This shall be prorated for part-time and overtime employees.

3.1.5.0.0. After 140 continuous minutes of teaching, supervision or any combination thereof, an employee shall be allowed at least 35 minutes free from any teaching or supervision assignment.

3.1.6.0.0. Attendance at activities during evenings and on week-ends shall be voluntary.

3.1.7.0.0. The employer shall make every reasonable effort to arrange timetables for part-time teachers that leave either the first or last part of the day free.

8. Mr. Birket went over those proposals at the December 8 negotiating meeting and explained them to the College's bargaining committee. It was then agreed that at the next meeting the parties would concentrate on section 1 of the Federation's proposals, which included such matters as recognition, union membership and check-off, discipline and discharge, existing practices, "no discrimination", grievances, and arbitration. Although the Federation's bargaining committee wanted an earlier meeting, Ms. Roberts was not available until January 22 due to other commitments. Accordingly, the parties agreed to meet on January 22 at 7:30 p.m.

9. At the January 22 negotiation session, Ms. Roberts, after making some preliminary comments regarding a number of matters (including the limited funds available to the College and the need for more students and a greater variety of programs), went through the first half of section 1 of the Federation's proposals in considerable detail. Some of her questions clearly reflected the College's lack of experience regarding collective bargaining. For example, she asked the meaning of "without just cause", and also asked if it meant that a person "can go to the courts". Near the end of that two and a half hour meeting, Mr. Birket expressed concern about the slow pace of negotiations and about the College's failure to provide a written counter-proposal at that meeting. The College's representatives then explained the problems which they had encountered, including the absence on vacation of the Chairman of the College's Finance Committee, the eye operation which their accountant had undergone, the fact that they did not yet know their budget position for 1987-88, and the lack of readily available costing. The parties agreed to form a small committee to discuss seniority and salary costing prior to the next negotiating meeting, which was tentatively scheduled for February 10 and 11. However, that small committee never met, and Ms. Roberts subsequently called Mr. Birket to cancel February 10 and 11. Further discussions between Mr.

Birket and Ms. Roberts ultimately led to March 18 being set as the date for the parties' third negotiation session.

10. As a result of some concern about the College's ability to conduct negotiations with the Federation, E. Sanders, who was at that time the Chairman of the Bd., contacted Mr. Storie, an experienced and very able labour lawyer who had represented the College in respect of the Federation's application for certification. Since the College was desirous of being represented at the bargaining table by Mr. Storie's law firm but was experiencing financial difficulties, Mr. Storie arranged for Mr. Shamie, who was then articling with the firm, to become the College's spokesperson at the bargaining table. Mr. Shamie has an M.B.A. in industrial relations from McGill University and an LL.B. from Queen's University. While studying for his law degree, he served as a lecturer in respect of an industrial relations course offered by the Faculty of Commerce, having earlier taught courses in industrial relations in the University of New Brunswick's Faculty of Administration and served as an adjudicator with the New Brunswick Public Sector Labour Relations Board. It was the feeling of Mr. Storie and his partners that, with some supervision of Mr. Shamie by Mr. Storie, the firm could accommodate the College in a professional way but reduce the cost significantly by having Mr. Shamie serve as the College's new spokesperson at the bargaining table.

11. Some of the College's bargaining costs were subsidized by the Conference of Independent Schools, from February to June of 1987. During that period, Mr. Storie provided the Conference with a general status report from time to time, but took no instructions from the Conference regarding the negotiations.

12. After receiving background information from Mr. Storie about the College, and familiarizing himself with the proposals which the Federation had given to the College in December, Mr. Shamie did some research into private school collective agreements. In doing so, he discovered that with the exception of some Hebrew schools in the Metropolitan Toronto area, the only private school in the province which was bound by a collective agreement was the Toronto French School, which had entered into a collective agreement (the "T.F.S. Agreement") with Alliance des Enseignants de la Toronto French School, an employees' association that represented the teachers at that school. Mr. Shamie also spoke with Charles Beer, who heads the Conference of Independent Schools. Through his discussions with Mr. Beer, Mr. Shamie gained further information about private school standards. In summarizing the College's situation in comparison with other private schools, Mr. Shamie testified as follows: "Generally Alma was a bit of the poor sister as compared to the other private schools. Its tuition fees were lower. They also had a fluctuating enrolment from year to year, whereas most of the other private schools had a constant enrolment and always a healthy waiting list. In terms of the number of courses that teachers are required to teach at Alma, they were well lower than the average at the other private schools. As well the rates of pay for the teachers at Alma were lower than those at other private schools...."

13. To assist the College in formulating a counterproposal to the Federation's initial position, Mr. Storie drafted a number of administrative provisions and sent them to the College. Several of those provisions were modelled on provisions contained in the T.F.S. Agreement. On February 24 Mr. Storie attended at the College with Mr. Shamie for the purpose of reviewing those proposals, introducing Mr. Shamie to the Bd., and explaining the collective bargaining process and various provisions of the Act, including sections 40a, 43, and 79. To avoid further delays in bargaining, it was agreed that instead of taking instructions from the full Bd., Mr. Storie and Mr. Shamie would deal with the Chairperson of the Personnel Committee and forward all drafts to her. At that meeting, the Bd. approved, with a few minor changes of a cosmetic nature, the provisions drafted by Mr. Storie.

14. On February 25, Mr. Shamie telephoned Mr. Birket to introduce himself and to advise Mr. Birket that he would be bargaining on behalf of the College. He also told Mr. Birket that he would be sending him some contract proposals regarding non-monetary items. Those proposals, which Mr. Shamie forwarded to Mr. Birket on February 26, included purpose, recognition, management rights, union security, "no strike, no lockout", relationship, representation, and duration clauses, as well as provisions regarding grievances and arbitration, bulletin boards, maternity leave, a committee on common concerns, new employees, and teaching hours. They also included the following provisions:

ARTICLE 3 - MANAGEMENT RIGHTS

3.01 The Union recognizes and acknowledges that the right to manage and conduct the business and affairs of the College is fixed exclusively in the College and without limiting the generality of the foregoing the Union acknowledges that it is the exclusive function of the College to:

- (a) select, hire, transfer, promote, demote, layoff, recall employees covered by this Agreement and select employees for positions excluded from the bargaining unit;
- (b) maintain order, discipline and efficiency and in connection therewith to make, alter, publish and enforce reasonable rules and regulations, policies and practices to be observed by employees covered by this Collective Agreement, discipline or discharge employees for just cause, provided that a claim for unjust discipline or discharge of an employee who has completed his probationary period may be the subject matter of a grievance and dealt with as hereinafter provided;
- (c) determine programs and activities of the College, the number of employees to be employed, teaching and other duties and responsibilities of employees; the number of students to be allocated to a program, class size, the assessment of staff, the designation of positions of responsibility and the selection of individuals to positions of responsibility, working hours, the school year and the holidays to be observed, and such other aspects of the College's jurisdiction as are in compliance with the prevailing statutes and regulations pertaining to education in the Province of Ontario;
- (d) have the sole and exclusive jurisdiction over all operations, buildings, facilities and equipment.

ARTICLE 13 - TEACHING HOURS

13.01 It is acknowledged that notwithstanding other provisions in this Agreement, employees are required to perform additional duties and accept additional responsibilities outside of normal classroom hours including but not limited to the provision of special help to students, standby or supplementary periods, staff meetings, supervision of lunchroom and recess periods, supervision of sports and other school activities and preparation for and the making of work for classroom and other duties in accordance with the College's usual practices. Employees not required to teach the maximum periods normally allocated to full time employees may be assigned specific administrative and supervisory duties in the periods not worked.

15. In describing his reaction to those proposals, Mr. Birket told the Board, "I blew steam at [Articles 3 and 13]. There was a lot I didn't like, but I thought those two were outrageous. Under Article 13, a teacher would be on duty seven days a week, 365 days a year. It gives the College one hundred per cent of the teachers' time and sets no limits on working hours. It comes out of another collective agreement but it's a day school with no boarding component. In that context it takes on a different meaning."

16. In explaining the College's rationale for the management rights clause which it pro-

posed (on the advice of counsel), Mr. Shamie told the Board: "It's virtually a carbon copy of the management rights clause in the Toronto French School collective agreement. The rationale of the College on this clause is that it is important in this day and age to have all of the rights of management set out in a particular article so that there can be no confusion or problems with any of the issues, in terms of the arbitral case law, as well as the specific functions inherent in a private school." That evidence was confirmed by Mr. Storie, who also told the Board, "This management rights clause is as normal as apple pie."

17. Mr. Shamie's explanation of the College's rationale regarding Article 13 was: "This is another article directly out of the Toronto French School collective agreement. The rationale for this article is that Alma is not only a private school but a boarding school, so that students live on the premises twenty-four hours per day. This in some circumstances may necessitate the involvement of teachers in activities outside of teaching hours, and all the responsibilities set out in the article relate to those additional duties."

18. Messrs. Shamie and Birket subsequently agreed to March 18 as the date for the parties' next negotiation session. To further prepare for that session, Mr. Shamie attended at the College on March 10 and met with the Vice-Principal and the Bursar to discuss a number of matters, including existing workload, fringe benefits, evaluation procedures, and the College's financial state. Through those discussions and his earlier meeting with the Bd., Mr. Shamie gained the following information. The College had seven part-time and nine full-time teachers at that time. Most of the full-time teachers at the College were teaching five courses, each of which involved six thirty-two minute periods per week (for a total of 960 minutes per week). Two full-time teachers had agreed to teach an extra course; thus, they were each teaching six courses. In addition to their teaching responsibilities, each full-time teacher was required to perform some additional duties, including one hour of lunch break supervision per week, one hour (3:45 to 4:45 p.m.) of "club time" per week, fifteen minutes of "morning chapel" per day, four hours of "detention duty" per year, and two or three other supervision duties (such as supervising dances) over the course of the year. Six "house mothers" were responsible for the students during the evenings and at all other times when teachers were not present at the school. The College was concerned about what it perceived to be a lack of commitment to the school by some part-time teachers who were teaching courses only in the morning or the afternoon as a result of "individual deals" which they had made with the former principal of the College. The College is financed primarily by students' tuition and board payments. It receives no government funding. In order to attract students, it must compete with other private schools on the basis of quality of education and extra-curricular activities. As of March 10, it was already running a deficit of \$140,000 for the 1986-87 school year, with an expectation that the total deficit for that school year would likely be somewhere between \$160,000 and \$200,000. Through his discussions with representatives of the College, Mr. Shamie also became aware that the College wished to move to a standard full-time teaching load of six courses per full-time teacher, in order to bring itself into line with the private school norm and to have greater flexibility regarding the courses which could be offered.

19. At the March 18 negotiation session, the College was represented by Mr. Shamie and Ms. Masur-Leitch. The possibility of some members of the Bd. being on the College's bargaining committee had been discussed when Messrs. Storie and Shamie met with the Bd. on February 24, but the idea was rejected as it was not possible for any members of the Bd. to be present at all of the bargaining sessions, which it was anticipated would take place at "odd hours" and on weekends. However, it was left open that Ms. Roberts, who was to be a resource person for Mr. Shamie, would attend if her schedule permitted her to do so. At the commencement of the March 18 negotiation session, Mr. Shamie noted that the College differed from public schools in that it was funded primarily by tuition fees and did not receive, and would not accept, any government fund-

ing. He also indicated that he had not yet received any directives from the Bd. concerning curriculum, staffing requirements, or teaching load, but that those directives would be formulated at a future Bd. meeting. Mr. Shamie then went through all of the College's proposals (which he had mailed to Mr. Birket), and explained the College's position. In respect of the management rights clause, Mr. Shamie indicated that it was of prime importance to the College to have a management rights clause in the contract in order to be in a position to run the school. He also indicated that the fact that the Federation did not like the clause was not sufficient to justify its removal. He further stated that the College would appreciate having a response from the Federation with respect to each section in the management rights clause proposed by the College, and expressed a willingness to negotiate about any aspects which were of concern to the Federation.

20. In commenting on Article 13 at the March 18 negotiation session, Mr. Shamie noted that it was taken from the T.F.S. Agreement, and stated that the Bd. was eager to spell out the unique responsibilities of a teacher at Alma College. In this regard, he expressed management's view that they needed the flexibility to ask teachers to perform those duties because the College was a boarding school, at which the additional duties and responsibilities covered by that provision took on a greater importance than they would have in the context of a school where the students were free to go home at the end of the day. In response to Mr. Birket's assertion that the professionalism of the College's staff made such a provision unnecessary, Mr. Shamie stated that the Bd. wanted to ensure that the staff would fulfil those important duties and responsibilities, in keeping with the College's aims and objectives of providing a higher level of education.

21. There was also considerable discussion at that meeting in relation to the "committee on common concerns" proposed by the Federation. Mr. Shamie stated that the Bd. thought it was a good idea, and indicated that the Principal and Vice-Principal would be the College's representatives on the committee. Mr. Birket's response was that the teachers were concerned about the Principal and Vice-Principal being the College's only representatives on the committee. He suggested that the committee should include some members of the Bd. When Mr. Shamie noted that both the Principal and the Vice-Principal were members of the Personnel Committee which represented and reported to the Bd., Mr. Birket asserted that the Federation was looking for some "out of school input" and "someone other than paid administration".

22. At the March 18 negotiation session, the parties reached agreement on several clauses, including provisions regarding relationship, representation, and new employees, as well as three clauses pertaining to union security. It was also agreed that the next bargaining session would take place on April 3 and 4.

23. On April 3 Mr. Shamie tabled on behalf of the College contract proposals regarding lay-off and recall, evaluation, and employee personnel files. Those proposals were initially drafted by Mr. Shamie and then revised by Mr. Storie. The proposed lay-off and recall provision read as follows:

Article 16 - Lay-off and Recall

16.01 In cases of lay-off and recall the following factors shall be considered:

(a) academic and professional qualifications; teaching proficiency; ability and effectiveness of the teacher; experience and ability to teach the required subject materials and the requirements of the College's programmes, including the duties set out in Article 13.

(b) seniority with the employer.

When the matters in factor (a) are relatively equal in the opinion of the College, then factor (b) shall govern.

- 16.02 Employees declared surplus shall be placed on a mailing list and for a period of two years after termination shall be given first consideration for vacant positions in accordance with the principles contained in Article 16.01.

24. Mr. Shamie's testimony regarding the College's rationale for Article 16 was: "Article 16 is also taken out of the Toronto French School collective agreement. The rationale for the article is that it is a competition type clause. As a private school we are in a heavily competitive market. As such we want to ensure that we have the highest quality in our academic staff because, at the end of the day, it's the quality of the academic staff that will attract students. The more students we have, the more viable the institution will be." Mr. Shamie also noted that the current collective agreement (for academic employees) between the Ontario Council of Regents for Colleges of Applied Arts and Technology and the Ontario Public Service Employees Union (the "Community Colleges Agreement") contains a "competition clause" which provides, in part, as follows:

8.05 When the College decides to lay off or to reduce the number of full-time employees who have completed the probationary period or transfer involuntarily full-time employees who have completed the probationary period to another position from that previously held as a result of such lay-off or reduction of employees, the following placement and displacement provisions shall apply to full-time employees so affected. Where the competence, skill, and experience of employees to fulfil the requirements of the full-time position concerned are relatively equal, seniority shall apply....

25. At the April 3 negotiating meeting, Mr. Birket stated that the Federation wanted to have a full contract proposal from the College, including monetary proposals and provisions concerning staffing. Mr. Shamie indicated that he was in a position to discuss principles but not specific contract language, as no firm positions concerning those matters had yet been decided upon. He also stated that there was soon going to be a meeting of the Personnel Committee to formulate positions on those matters. The parties then proceeded to discuss recognition, management rights, union security, "no strike, no lockout", relationship, representation, bulletin boards, grievance procedure, the committee on common concerns, and duties and responsibilities. Mr. Shamie noted that the Federation's proposals did not contain a layoff and recall provision, and asked Mr. Birket to table a proposal on those matters.

26. Negotiations continued on the following morning. During that session, Mr. Birket tabled the following proposal:

ARTICLE XX LAYOFF AND RECALL

- XX.01 Before April 25 of each year, the college, in consultation with the union executive, shall make a determination of the projected number of students for the September following.
- XX.02 The number of teachers to be employed for the school year commencing in September shall be not less than the number calculated by applying the PTR in 5.1.1.0.0. to the projected number of students above.
- XX.03 In the event that there are more teachers on staff than are needed for the next school year after taking attrition into account, layoffs may be done but in order of seniority, least senior first.
- XX.04 If the application of seniority in XX.03 causes the layoff of a teacher who is the only qualified teacher for courses planned for the following year, then that teacher may be retained and the next teacher in seniority order may be laid off.

- XX.05 Employees laid off shall be placed on a mailing list and for a period of two years after layoff shall be recalled in order of seniority for positions for which they are qualified.

At that meeting, the College's bargaining committee asserted that seniority is less important than qualifications and that enrolment depends to a large extent upon having good teachers. They also took the position that employee dedication is important and that it is essential that the College have the right to make decisions on that basis. They also noted that their layoff and recall provision had been taken directly from the T.F.S. Agreement. The Federation's bargaining committee, on the other hand, stated that job security is the essence of unionism and is of the utmost importance to the teachers. They expressed the view that the probationary period and the "qualifications" limitation on seniority rights in the context of layoffs provided sufficient protection for the College. Following that rather heated discussion, each of the parties attempted to foster some progress by making some package offers. Although none of the packages was accepted, the parties succeeded in narrowing their differences on a number of issues. April 24 and 25 were agreed upon as the dates on which negotiations would continue.

27. On April 15 Mr. Shamie met with Ms. Roberts, Ms. Masur-Leitch, and some other members of the Personnel Committee for about two and a half hours to review some additional proposals which he had drafted (with the assistance of Mr. Storie). At that meeting, Mr. Shamie received instructions about how much flexibility the College had on various aspects of those proposals. (For example, the College's opening position on sick leave accumulation was to be that a maximum of fifteen days could be accumulated by each teacher; at that meeting, Mr. Shamie was given authorization to increase that to twenty days during the course of bargaining.)

28. On April 20, Mr. Shamie caused an updated copy of the College's proposals to be delivered to Mr. Birket. They included provisions regarding probationary period, sick leave, leave of absence without pay, professional development, and fringe benefits, as well as the following proposals which Mr. Shamie drafted, with input from Mr. Storie:

Article 19 - Teaching Hours

- 19.01 Full-time teacher - maximum of six credits per year.
- 19.02 Maximum of 40 teaching periods per week.
- 19.03 One teaching period equals 32 minutes.
- 19.04 Maximum of 1280 minutes of teaching per week.

NOTE: CONTRACT LANGUAGE TO BE DEVELOPED

Article 20 - Part-Time Teachers

- 20.01 The College has the sole discretion to determine if and how many part-time teachers are required by the College for each academic year.
- 20.02 Seniority and years of teaching experience in respect of any part-time teacher shall be determined on the basis of the following accumulation of seniority:
 - 26 periods or more a week - one year of seniority for each year worked
 - 15-25 periods a week - one half year of seniority for each year worked
 - less than 15 periods a week - no seniority

- 20.03 Actual remuneration for part-time teachers shall be on a pro-rata basis as set out in the salary grid.
- 20.04 It is recognized that the number of teaching periods assigned to part-time teachers may vary from time to time with the requirements of the College.
- 20.05 Part-time teachers shall be responsible [sic] for the performance of additional duties and responsibilities as set out in Article 13 of this collective agreement. Part-time teachers shall attend all staff meetings.

29. During the course of bargaining and during his testimony before the Board, Mr. Shamie expressed the view that the seniority accumulation provision proposed by the College was an equitable system which would serve the interests of full time teachers and part-time teachers. Mr. Storie expressed a similar view. His evidence in chief concerning that proposal was that there is "absolutely nothing unusual" about pro-rating seniority for part-time employees. He also testified: "The form here is in block times. I'm more accustomed to pro ration based on actual hours worked. That's the norm in the hospital industry. I don't believe I have ever negotiated a collective agreement where the accumulation of service for part-time employees is the same as that for full-time employees...." During his cross-examination, he added that both he and the Bd. felt that the Federation's principle of equal seniority accumulation by full-time and part-time teachers was unfair.

30. The April 24 bargaining session was scheduled to begin at 4:00 p.m. Mr. Shamie went to the College earlier that day with a view to obtaining a monetary proposal from Ms. Roberts. However, he did not have that proposal at the commencement of the meeting, because Ms. Roberts was late in arriving that afternoon. Messrs. Shamie and Birket, who had developed a good professional relationship, met privately in the hall prior to that meeting. After Mr. Shamie explained the situation, Mr. Birket stated that he would caucus with his committee and provide a response. At the commencement of the negotiation session, Mr. Birket noted that at the previous meeting he had made a strong request for a complete set of proposals, including the College's monetary proposals. He stated that his committee intended to treat seriously the College's failure to comply with that request, and indicated that the Federation would be applying for conciliation on the following Monday. He also told the College's representatives that his committee was not willing to continue negotiations until either a conciliation officer was appointed or they were provided with a complete proposal by the College. In response, Mr. Shamie stated that the College was considering a wage proposal and that he hoped to be in a position to table it later that day. He also advised them that the College's projected enrolment for the 1987-88 school year was very low and that this projection was causing the Bd. serious concern about the viability of staying open. He added that although no decision had yet been made about that matter, he had a duty to disclose that possibility. The College then requested time to caucus, and asked the Federation's bargaining committee not to leave.

31. By the time the parties reconvened twenty minutes later, Ms. Roberts had arrived. As a preface to the College's monetary proposal, Mr. Shamie noted that the additional funds needed to cover a salary increase for the next school year would have to be generated either by an increase in tuition fees or a layoff. He also stated that the College's deficit for the current school year was already \$160,000, and was projected to rise as high as \$200,000 by the end of that school year. He added that the bank could call the College's loan at any time.

32. The College's initial monetary proposal was that the status quo be maintained for the balance of the 1986-87 school year and that for the 1987-88 school year, the teachers be put on the Elgin County Board of Education's grid, as proposed by the Federation, but that their salaries for the 1987-88 school year be 65% of the salaries on that grid. Any teacher whose existing salary was higher than that would be "red circled". If the College employed any part-time teachers their sala-

ries would be pro-rated. The offer was expressly indicated to be dependent upon enrolment, reorganization of teaching staff in terms of duties and number of hours, and possible layoffs. In commenting on the absence of any further salary increase for the 1986-87 school year, Mr. Shamie noted that the teachers had already received a 5% increase for that year, and noted that it was impossible for the College to retroactively raise tuition fees. In the ensuing discussion, Mr. Birket indicated that 65% was not acceptable to the Federation, but added that he recognized it to be merely the College's first offer. In this regard, he noted that the offer would result in fourteen teachers being red circled, with only two teachers receiving a raise. Nevertheless, he recognized the College's willingness to accept the Elgin County grid as an important first step towards eliminating the salary inequities which had developed at the College. When Mr. Birket asked how important the Elgin County Board of Education grid was to the College, Mr. Shamie replied that it was seen to be a useful comparison because of its objectivity and its application to teachers working in the same area, but added that the College would be quite amenable to structuring an "Alma College grid".

33. At that meeting, Mr. Birket stated that there were two major issues from the teachers' perspective: seniority and a means of effective communication with the Bd. concerning the future direction of the College. He told the College's bargaining committee that their layoff proposal was unacceptable to the Federation, and also expressed serious concern about the Bd.'s desire to increase the full-time workload from five to six courses, and to reduce its reliance on part-time teachers. In support of the College's desire to "move to full-time and then hire part-time if required", Mr. Shamie noted that the effective cost of fringe benefit coverage was less for full-time teachers than for part-time teachers (because the College paid the same fringe benefits for part-timers as it did for full-timers). He also noted that a number of the College's part-time teachers worked only mornings or afternoons, and suggested that the College could no longer work under that system as the College needed greater flexibility if it was to remain in operation. He further noted that the College's justification for its workload proposal was that the teacher's existing workload was below the norm for private schools. Both parties agreed to apply for conciliation (on the following Monday), and to continue to negotiate in the interim.

34. Bargaining continued until 8:55 p.m. on April 24 and resumed at 10:00 o'clock the following morning. In order to meet one of the teachers' major concerns, the respondent agreed that, in addition to the Principal and the Vice-Principal, the College would be represented on the committee on common concerns by a member of the Bd.'s Personnel Committee. (The teachers' representatives on the Committee were to be three teachers selected or appointed by the Federation.) The discussions were quite fruitful and, as a result of compromises by both parties, resulted in agreement on the following provisions:

Article 1	- Purpose 1.01
Article 2	- Recognition 2.02
Article 4	- Union Security 4.04
Article 5	- No Strike, No Lock-out 5.01 5.02
Article 7	- Representation 7.01 7.03
Article 8	- Grievance Procedure 8.01 - 8.17
Article 9	- Bulletin Boards 9.01
Article 11	- Committee on Common Concerns 11.01
Appendix "A"	- Single Arbitration Procedure
Article 17	- Evaluation 17.01 - 17.07
Article 18	- Probationary Period 18.01 18.02 18.03 18.05
Article 24	- Professional Development 24.01 24.02 24.03

The parties also agreed to meet on May 11 for further negotiations.

35. Discussions with other Federation officials led Mr. Birket to conclude that it would be inadvisable to apply for conciliation at that time, as Federation officials were concerned about "un-freezing" the teachers' terms and conditions of employment (which, by virtue of section 79(1) of the Act, could not be altered by the College without the consent of the Federation). On May 6, Mr. Birket telephoned Mr. Shamie and told him that he had decided not to apply for conciliation at that time.

36. The parties met on May 11 from 4:00 to 7:00 p.m. and continued to package proposals by (in the words of Mr. Birket) "putting together noncontentious and medium contentious items". Although no agreement was reached on any of the packages, some individual items were resolved. The meeting ended early because Ms. Masur-Leitch had to leave in order to attend the funeral of a family member. After that meeting, Mr. Shamie had dinner with the Federation's bargaining committee. It was decided during the dinner that Mr. Shamie would apply for conciliation. Mr. Shamie made that application on the following day. As a result of that application, Conciliation Officer Bernard Abes was appointed to confer with the parties and endeavour to effect a collective agreement.

37. The parties' next negotiation meeting took place on May 19. Seniority was the major topic of discussion. In explaining the College's rationale for the proposed differentiation between part-time and full-time employees for purposes of seniority accrual, Mr. Shamie expressed the view that the College's proposal (Article 20.02 as quoted above) was the easiest way to administer the seniority list and also the fairest. Mr. Birket disagreed with that position, and stated that the Federation did not want a seniority system which penalized part-time teachers. In testifying about the applicant's concerns about the respondent's seniority proposal, Mr. Birket told the Board: "One of the hangups is that wherever I've negotiated I've always thought of seniority as determining layoff, while teaching experience determines the grid position and pay.... They proposed a scheme that would have different seniority credit for full-time than for part-time. The effect would be that after some years as a part-time teacher you'd eventually be at the junior end of the seniority list. It represents a severe disadvantage for being part-time. It's been the Federation's observation that the people that take advantage of part-time are more often women. We view that approach to part-time seniority as anti-female." In support of the College's desire to reduce or eliminate the use of part-time teachers, Mr. Shamie stated that the College wanted to remain com-

petitive with other private schools. In that regard he noted that the College's heavy reliance on part-time teachers was out of step with the other private schools. He also asserted that full-time teachers are more involved, and take a more active role in their students' lives and extra-curricular activities. The parties tentatively agreed at that meeting to meet again on May 27. However, that meeting was subsequently cancelled because the Conciliation Officer was unavailable on that date due to a prior commitment.

38. The cancellation of the May 27 meeting was agreed to by Messrs. Birket and Shamie in a telephone conversation on May 25. During the course of that conversation, Mr. Birket asked Mr. Shamie how he would feel about putting the matter before the Board on the basis of first agreement arbitration. When Mr. Shamie replied that he had not given the idea any thought, Mr. Birket stated that he would probably make such an application if the parties came to an impasse in June. Mr. Birket also expressed the view that this would be an "easy way out", and that it would take them both "off the hook".

39. The Conciliation Officer convened a meeting of the parties on June 3. In addition to Mr. Shamie and Ms. Masur-Leitch, Don Harris, who had become the Chairman of the Bd. on March 26, was in attendance at that meeting on behalf of the respondent. Mr. Shamie told the Federation (and the Conciliation Officer) that the College had a crisis in enrolment, with only seventy students having actually enrolled and an estimated additional enrolment of only twenty students, for a total of ninety students in 1987-88, compared with 142 students in 1986-87. Mr. Shamie gave the Federation's bargaining committee lists which confirmed that information. Mr. Shamie also indicated that a Bd. meeting was soon to be held to decide whether the school would remain in operation or be closed. During the course of discussions which occurred between the parties in the presence of the Conciliation Officer, Mr. Birket asserted that job security was the major issue, with the Federation's proposals concerning pupil-teacher ratio, numbers of teachers, and part-time teachers being an attempt to preserve the status quo by means of language in broad use in the public education sector. Mr. Shamie, on the other hand, asserted that the College's proposals coincided with what other private schools were doing, and with the language of the T.F.S. Agreement. Mr. Shamie also asserted that the respondent was merely seeking to maintain the right to manage the College, a right which the respondent felt to be essential for future operations. No progress in resolving the outstanding issues was made that day. Near the end of that three-hour meeting, the Conciliation Officer told the parties that they would both have to go back and rethink their positions. He added that if they maintained their positions, they would be "just flogging a dead horse".

40. At the conclusion of the conciliation meeting, Mr. Birket advised Mr. Shamie that he was not going to "file for a 'no board' report". Mr. Shamie then told Mr. Birket that he would be seeking instructions before making a decision about that matter. After conferring with Mr. Storie, Mr. Shamie recommended to the College that they take that step in order to move negotiations along to a conclusion, and to place the College in a position to alter terms and conditions of employment for the 1987-88 school year. The College agreed. A "no board" report was subsequently requested and granted (on June 16).

41. Mr. Storie was kept abreast of the negotiations by Mr. Shamie, with whom he reviewed the situation before and after each negotiation session. By the beginning of June, Mr. Storie became concerned that some issues which he thought should have been settled by that point in time remained in dispute. Accordingly, in mid June he (and Mr. Shamie) met with Mr. Harris and other members of the Bd. to review the issues and give the negotiations a sense of direction. At that meeting, Mr. Storie recommended that the College abandon its plan to reduce its reliance on part-time teachers in 1987-88 by agreeing to maintain the status quo, with a view to resolving what had become a major issue at the bargaining table. His evidence concerning that recommendation

was: "I said to the Bd. that one of the difficulties with bargaining a first collective agreement is you find out what the rest of the world's doing. It's true regarding part-time/full-time complement that the Conference schools are essentially full-time, but the College has employed part-time for many years. You can't simply unwind in one agreement what has existed for a long time." Mr. Storie's recommendation was accepted by the Bd.

42. Following that meeting, Mr. Storie called Mr. Birket and requested that a further negotiation session be held. Mr. Birket agreed. When the parties met on June 24, Mr. Shamie (who was accompanied by Ms. Masur-Leitch and Mr. Harris) gave the Federation's bargaining committee the following information. Enrolment was then at 83 students, with 100 students being a realistic estimate, and 140 students being an optimistic possibility. The College's figures indicated that with 100 students, there would be a \$400,000 deficit. Nevertheless, the Bd. had decided to further explore the possibility of keeping the school open, although certain variables, such as the possibility of the bank calling its loan, were beyond their control. The Bd. was of the view that it was critical that the Bd. and the Federation work together and put their differences behind them. There were a number of "generalities" which the Bd. wanted the Federation's bargaining committee to think about. The College would not sign a collective agreement without a management's rights clause and a "competition" format layoff provision. However, the Bd. recognized that part-time teachers had played a valuable role at the College, and was prepared to permit those who wished to continue to teach part-time to do so. In time-tabling, the College would attempt to accommodate the needs of part-time teachers, but needed discretion and could not be constrained to schedule individual part-time teachers only in the morning or the afternoon. The College wished to move to six courses as the normal full-time teaching load, and was prepared to compensate by means of a lump sum payment teachers who moved from five courses to six courses. The change in course load would not generate any layoffs as the College planned to offer some new courses. However, some teachers might have more lesson preparations as a result of the change. Part-time teachers would be guaranteed the same number of courses as they had previously taught, but they would not necessarily teach the same courses. The salaries of teachers who were unable to go to six courses would be frozen at the five course level for the next school year. If the College had 140 students in 1987-88, there would be no layoffs. If enrolment was lower, the College was looking at a layoff possibility, but was of the view that it could accommodate both the Federation's concerns about seniority and the College's concerns about qualifications, by laying off the most junior teacher. The College's new position was not reduced to writing, but rather was presented orally by Mr. Shamie in an effort to avoid getting "bogged down" on contract language. It was Mr. Shamie's intention to reduce it to writing in the event that the parties reached agreement in principle.

43. In responding to the College's overtures, the Federation's bargaining committee expressly recognized that the College had made a move on the "part-time issue". They were prepared to drop their vacation pay proposal and reduce their fringe benefit demands, but wanted five courses to constitute a full-time course load, with six courses to be taught only on mutual agreement and with 20% extra pay. They tabled a new grid, but continued to insist upon their own language regarding layoff and recall, as well as sick leave and leaves of absence. They reiterated the view that a management rights clause was unnecessary, but offered the following wording:

The Union recognizes the right of the College to manage and conduct the business of the College except insofar as it is constrained by the terms of this agreement, and the statutes and regulations of laws of Ontario.

44. In the ensuing discussions, the College's bargaining committee advised Mr. Birket and his committee that their proposals regarding managements rights, and layoff and recall, were unacceptable. They told the Federation's bargaining committee that they wanted those provisions to be in the format proposed by the College, but offered at that time, and at a number of other times

during negotiations, to go through them phrase by phrase and consider what the Federation disliked about them. However, Mr. Birket declined to do so, and merely asserted that the College's language was "repugnant". The College's bargaining committee also indicated that the lump sum payment which they were offering to teachers who moved from five to six courses would be \$500 in September and a further \$500 in January. When Mr. Birket characterised that offer as being "insulting", Mr. Shamie asked him what he expected in the context of an expected deficit of \$400,000. He also noted that the new grid which the Federation had tabled represented a \$100,000 increase, and said that it was "ridiculous". Mr. Birket then expressed a similar view concerning the College's offer. After caucusing with the applicant's bargaining committee to further consider the respondent's new position, as amplified by the hours of discussion which had taken place that day, Mr. Birket met privately with Mr. Shamie and told him that the College's position was unacceptable. He also told Mr. Shamie that the Federation would in all likelihood be making a section 40a application during the first week of August.

45. Mr. Shamie was away on vacation from late June to July 24. (He and Mr. Birket had agreed that there would be no bargaining meetings during July.) After Mr. Shamie returned, he and Mr. Storie met with Mr. Harris. Following that meeting, Mr. Storie contacted the applicant's counsel, Maurice Green, and arranged to meet with him and Mr. Birket on August 4. Mr. Shamie was also present at that meeting which lasted approximately three hours. It was agreed that the meeting would be "off the record" and that the positions presented would be "without prejudice". At that meeting Mr. Storie put forward a "full settlement position" and stated that although it was not an offer, he was prepared to recommend it to the Bd. if Mr. Birket told him that it would form the basis of a settlement with the Federation's bargaining committee. In an attempt to meet the Federation's concerns regarding Article 13, Mr. Storie proposed that either a special committee be formed to deal with the administration of that provision, or that the following clause be added: "Such provision shall be administered in accordance with existing practices." He also expressed a willingness to "fine-tune" that provision so as to provide for additional duties and responsibilities to be allocated to part-time teachers on a pro rata basis. When Mr. Birket indicated that the inclusion of the words "preparation for and the making of work for classroom" was offensive to the teachers' professionalism, Mr. Storie indicated that if that was the only aspect of the provision that the Federation could not live with, he would delete it. With respect to Article 16, Mr. Storie expressed a willingness to remove the words "in the opinion of the College" from the final sentence in Article 16.01, and also to delete "including the duties set out in Article 13" from Article 16.01(a). Mr. Storie also offered to reduce the proposed maximum number of teaching periods per week from forty to thirty-six, and to reduce the maximum number of teaching minutes per week from 1280 to 1152, thereby reducing the College's flexibility to assign teachers to teach extra classes in cases of emergency or illness. Other changes embodied in the full settlement position included a reduction in the number of periods per week needed to qualify for each range of seniority accumulation, the addition of a clause by which the College agreed to "respond reasonably to requests by the Union to conduct Union business including membership meetings and conferences on College premises", an adoption of the Federation's position regarding access to personnel files, an increase in the maximum number of sick leave days which could be accumulated from fifteen to twenty, and an expression of willingness to permit teachers to accumulate three months' seniority while absent on maternity leave.

46. At the August 4 meeting, Mr. Storie gave Mr. Green and Mr. Birket a "discussion paper" which indicated a tentative 1987-88 teaching load and salary for each teacher. The proposed salary increases ranged from 5% to 21%, and averaged 7.5%. Although that discussion paper did not take the form of a grid, it was based on the grid which the Federation had proposed. Teachers whose salaries would have been reduced or left unchanged by that grid were to be given a 5% increase. Teachers whose salaries would have been increased by that grid were to be given half

of the increase, with the other half to be given in the 1988-89 school year. Mr. Storie requested Messrs. Birket and Green not to convey to the membership at large the information which they had received at that meeting, but indicated that they were at liberty to disclose it to members of the Federation's bargaining committee. At the end of the meeting, Mr. Birket told Messrs. Storie and Shamie that he would get back to them as soon as possible to let them know whether or not the full settlement position would form the basis of a settlement.

47. Following that meeting, Mr. Birket talked to those members of the Federation's bargaining committee whom he was able to contact. However, he was unable to reach them all because some of them were away on vacation.

48. When he had not heard from Mr. Birket by August 11, Mr. Shamie (on Mr. Storie's instructions) telephoned Mr. Birket's office and left a message requesting him to return the call. When Mr. Birket did so on the following day, he told Mr. Shamie that the full settlement position was unacceptable and that it would not form the basis of a settlement. He also indicated that the Federation would be filing an application under section 40a. Mr. Shamie then discussed the situation further with Mr. Storie, who was of the view that they should diffuse emotions by writing a letter to the teachers to advise them that the Federation had found the full settlement position to be unacceptable, to express empathy with their frustration with the bargaining process, and to further advise them that they would be receiving an interim raise of \$500 effective September 1, 1987, with any further increases agreed to in negotiations to be retroactive to that date. When Mr. Shamie called Mr. Birket and told him about the letter which they were planning to send, Mr. Birket became quite upset. After telling Mr. Shamie that he had understood the August 4 meeting to be "off the record", he stated that he would regard it as a significant breakdown in trust if the meeting was subsequently "put on the record". Mr. Shamie replied that he would get back to him about the matter.

49. Mr. Shamie had earlier learned from Ms. Masur-Leitch that at least one member of the Federation's bargaining committee was unaware of the August 4 meeting and of the full settlement position that had been given to Messrs. Birket and Green at that meeting. When Mr. Shamie met with Mr. Storie to discuss the situation, it was decided that a further meeting should be held for the purpose of tabling the full settlement position with the Federation's bargaining committee. Mr. Shamie then telephoned Mr. Birket, who was amenable to that idea but was not available until August 31. During that telephone conversation, Mr. Shamie asked Mr. Birket if there was going to be a strike on the first day of classes, which was the College's main concern at that time. Mr. Birket replied, "No, there will not be a strike on the first day. If I'm turned down on my section 40a application, then I'll take a strike vote." When he was asked (during cross-examination) why the Federation had not yet taken a strike vote, Mr. Birket replied as follows: "I see this as a pretty unique negotiation. If a union takes a strike vote and goes on strike, very often the company survives that. It was always the feeling of the teachers that taking a strike vote would be a short cut to all of my teachers being out of a job. I perceive the College's customers to be fairly right wing - the rich of Hong Kong. If there was a strike in the offing, I don't believe they'd stay. Therefore the place would close. Therefore I think it was responsible for me to think of it as even more of a last option than it normally is. I don't want it to close."

50. In his opening remarks at the August 31 meeting, Mr. Shamie, who was accompanied by Ms. Masur-Leitch and Mr. Harris, said that the Bd. understood and shared the teachers frustration over the fact that no collective agreement had been reached despite the fact that classes were to begin in two weeks time. He also indicated that there were only ninety-seven students enrolled as of that day. After noting that he, Mr. Birket, Mr. Green and Mr. Storie had met on August 4 to discuss a settlement position, he said, "Today we are going to put to you our best settlement posi-

tion - one that the three of us are willing to recommend.... This meeting is 'without prejudice', 'off the record'. This is not an offer. This is a settlement position. If you go to first contract, we will not offer this again." Mr. Birket agreed that the Federation would deal with the "without prejudice" position by not revealing it to an arbitrator, but reserved the right to disclose it to the teachers. Mr. Shamie then detailed the full settlement position described above. After that, Mr. Birket read a statement from the teachers which expressed vehement objection to what the teachers perceived to be an unjustified lack of consultation between the Bd. and the teaching staff with respect to working conditions.

51. When the meeting reconvened following a caucus, Mr. Birket stated that the Federation's bargaining committee recognized that the College had made a significant move on money, but suggested that it was not enough. However, he indicated that the committee was not turning down the full settlement position as they wanted to discuss it with the other teachers. In response to the teachers' statement which Mr. Birket had read to the College's bargaining committee, Mr. Shamie indicated that when there is a union and collective bargaining, no discussions concerning terms and conditions of employment are allowed between the teachers and the administration. He also noted that the "freeze" under section 79 of the Act had expired, and that the College's administration had made decisions on how best to run the school efficiently, with the students being the "first priority". Following further discussion of those matters, Mr. Birket stated that the Federation's bargaining committee would discuss the full settlement position with staff and that he would contact Mr. Shamie within a few days. There was then an informal meeting of members of the two negotiating teams in the absence of Messrs. Birket and Shamie. (The evidence does not disclose what occurred at that meeting.)

52. On September 3, Mr. Birket telephoned Mr. Shamie to advise him that the full settlement position was unacceptable to the teachers, and that the Federation would be applying for an arbitrated first contract under section 40a within the next week. As indicated above, the instant application was filed with the Board on September 11, 1987.

53. Section 40a provides, in part, as follows:

40a.-(1) Where the parties are unable to effect a first collective agreement and the Minister has released a notice that it is not considered advisable to appoint a conciliation board or the Minister has released the report on a conciliation board, either party may apply to the Board to direct the settlement of a first collective agreement by arbitration.

(2) The Board shall consider and make its decision on an application under subsection (1) within thirty days of receiving the application and it shall direct the settlement of a first collective agreement by arbitration where, irrespective of whether section 15 has been contravened, it appears to the Board that the process of collective bargaining has been unsuccessful because of,

- (a) the refusal of the employer to recognize the bargaining authority of the trade union;
- (b) the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification;
- (c) the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement; or
- (d) any other reason the Board considers relevant.

54. In commenting upon the purpose and scope of those provisions, the Board wrote as follows in *Nepean Roof Truss Limited*, [1986] OLRB Rep. July 1005:

16. It is clear from these provisions that the legislature has acknowledged the significance to the

collective bargaining relationship of the first contract, and has given statutory recognition to the potential difficulties that may be encountered in achieving it. This remedy does not supplant the primacy of the free bargaining process; rather, it recognizes that the negotiation of the first agreement may sometimes be thwarted by unjustified intransigence. Although this is remedial legislation and should be given a liberal construction and interpretation, the scheme of section 40a does not envision the automatically imposed settlement of a first collective agreement in all cases where the parties are unable to negotiate one. What it provides is access to this remedy where certain conditions precedent have been met. These conditions are enumerated in subsections (a) - (d) of section 40a(2).

17. To understand the conceptual underpinnings of the legislation, it is useful to dissect the language of section 40a(2). The Board is directed to impose settlement of a first collective agreement by arbitration where "it appears ... that the process of collective bargaining has been unsuccessful because of ...". The Board is thereby obliged to consider the following factors:

i) "The process of collective bargaining". The use of the word 'process' imports into the deliberation an examination of the interaction between the two parties. It is a truism that the negotiation of any contract involves a considerable range of bargaining positions and tactics. It is a dynamic exchange, with each party relying as extensively as possible on those postures most likely to induce the other side to accept a tolerable result. The Board must therefore be sensitive to this bargaining reality when considering how each party has conducted itself. It is the totality of the process that is under scrutiny, and the Board must be cautious not to examine the complaint in a factual vacuum. The conduct of both parties is therefore relevant, not only for understanding why the process has been unsuccessful, but also for assessing whether it has been unsuccessful for any of the enumerated reasons. This does not intend to suggest that the applicant's conduct will be a bar to the imposed settlement of a first contract, but rather that its conduct is relevant in assessing the reason for the failure of the process.

ii) "The process ... has been unsuccessful because of...". This language makes it clear that section 40a contemplates a cause-and-effect oriented assessment. Unless the applicant can demonstrate that the reason for the unsuccessful process is the employer's refusal to recognize the union's bargaining authority, the respondent's unreasonably uncompromising bargaining proposals, the respondent's dilatory or unreasonable efforts to reach an agreement, or any other reason the Board deems relevant, then notwithstanding the failure to conclude an agreement, the Board is not entitled to direct its imposition. In the infancy of this legislation, it has yet to be determined what other reasons the Board may consider relevant within the meaning of section 40a(2)(d), but logic and the spirit of section 40a suggest that this will involve a case-by-case analysis of whether there is a casual connection between the "reason" in question and the failure of the collective bargaining process.

iii) "Irrespective of whether section 15 has been contravened". Section 15 of the *Labour Relations Act* imposes the duty to "bargain in good faith and make very reasonable effort to make a collective agreement". The reference to section 15 in this way can only be interpreted as making a distinction between bad faith bargaining and first contract assessments. The Board is not to be bound by whether or not the conduct complained of violates section 15. Given the Board's jurisprudence pursuant to section 15, wherein the Board has held that hard bargaining is not necessarily bargaining in bad faith (*T. Eaton Company Limited* [1985] OLRB Rep. March 491; *Radio Shack* [1985] OLRB Rep. Dec. 1789), one is left with the inescapable conclusion that the legislature has intended a different standard to apply in the determination of first contract disputes, a standard peculiar to section 40a adjudications. This does not suggest that contravention of section 15 is irrelevant. A contravention of section 15 may well be a factor to consider in assessing why the process was unsuccessful. But the absence of sufficient facts upon which to find a contravention of section 15 does not preclude the application of section 40a. Hard bargaining may not violate section 15, but rigid bargaining proposals may, if they fall within subsections (a) - (d) of section 40a(2), justify the imposed settlement of a first collective agreement.

55. Counsel for the respondent contended that in the instant case, the process of collective

bargaining has not been unsuccessful. However, we find no merit in that position. As indicated above, the parties have had over a dozen bargaining sessions during the period from December of 1986 to September of 1987. During those sessions, they have spent many hours attempting to resolve the matters in dispute between them, but have been unable to do so. On the totality of the evidence, it is quite clear that the process of collective bargaining has been unsuccessful in the circumstances of this case.

56. Having found the process of collective bargaining to have been unsuccessful, we must next consider whether or not that lack of success has been caused by one or more of the conditions or circumstances listed in parts (a) to (d) of section 40a(2). In this regard, it is the applicant's position that the respondent failed to make reasonable or expeditious efforts to conclude a collective agreement. The applicant also contends that the respondent has adopted, without reasonable justification, an uncompromising bargaining position in respect of management rights, seniority, layoffs, and related issues. Thus, the applicant has confined its case to parts (b) and (c) of section 40a(2), and does not rely upon parts (a) and (d).

57. The essence of the applicant's position with respect to section 40a(2)(c) is that by not agreeing to meet more frequently, and by not providing its negotiating team with a proper mandate to negotiate, the respondent failed to make reasonable or expeditious efforts to conclude a collective agreement. Counsel for the respondent acknowledged that "early on there was the odd bump", but submitted that as soon as the respondent realized that it was out of its depth and retained counsel, the situation was rectified.

58. As indicated above, the applicant gave the respondent notice to bargain on or about November 27, 1986, and the first negotiation session took place on December 8. The second negotiation session did not occur until almost two months later (on January 22, 1987), due to Ms. Roberts' other commitments. No counterproposal or other response to the applicant's proposals was tabled at that meeting. A third session was scheduled for February 10 and 11, but those dates were cancelled by Ms. Roberts. Further discussions between Mr. Birket and Ms. Roberts ultimately led to March 18 being set as the date for the parties' third negotiation session. If bargaining had continued at that pace, with intervals of nearly two months between bargaining sessions, there can be little doubt that a finding of a failure to make expeditious efforts to conclude a collective agreement would have been warranted. However, once Mr. Sanders' concerns about the College's ability to conduct negotiations prompted him to contact and retain Mr. Storie's law firm to represent the College in negotiations, the pace of bargaining accelerated and the Federation no longer encountered any significant difficulties in scheduling further bargaining sessions. We are also satisfied on the totality of the evidence that the Bd., through its Personnel Committee, gave the College's negotiators an adequate mandate to negotiate. Although there was some delay in providing the applicant with a monetary proposal, that delay did not materially impede collective bargaining, nor cause the process of collective bargaining to be unsuccessful. The differences between the parties with respect to non-monetary items were more than enough to occupy their time at the bargaining table prior to April 24, when the respondent tabled its initial monetary proposal. Indeed, it is clear from the totality of the evidence that the parties' inability to achieve a collective agreement resulted not from their monetary differences, but rather from their differences regarding management rights, seniority, layoffs, and related non-monetary issues.

59. For the foregoing reasons, we find that part (c) of section 40a(2) does not provide a basis for a first contract arbitration direction in the circumstances of this case. We turn next to section 40a(2)(b). Counsel for the applicant submits that the respondent has adopted, without reasonable justification, an uncompromising bargaining position with respect to management rights, seniority, layoffs, and related issues. In respect of that contention, the applicant relies upon the

Board's decision in *Formula Plastics Inc.*, [1987] OLRB Rep. May 702. Respondent's counsel, on the other hand, submits that his client has not adopted an uncompromising bargaining position on any of those issues. In the alternative, he submits that the respondent has reasonable justification for the position which it has adopted regarding those matters.

60. There appears to be some merit in counsel's contention that the College has not adopted an uncompromising bargaining position regarding management rights, seniority, layoffs, and related issues. It is true that the respondent is insistent upon having a management rights clause included in the collective agreement. However, on several occasions during the course of negotiations, Mr. Shamie invited Mr. Birket to go through the wording of the management rights clause proposed by the respondent and to identify the parts of it to which his committee objected, with a view to determining whether some compromise could be achieved. By declining to do so, the Federation's bargaining committee has made it difficult, if not impossible, to determine whether or not the College has in fact adopted an uncompromising bargaining position in respect of management rights. With respect to Article 13, which was another source of considerable controversy between the parties, Messrs. Storie and Shamie attempted to meet the Federation's concerns about its open-endedness by suggesting that a special committee be formed to deal with the administration of that provision, or that a clause be added by which the provision would be administered in accordance with existing practices. Mr. Storie also offered to delete the words "preparation for and the making of work for classroom", in an attempt to meet Mr. Birket's concern that those words were offensive to the teachers' professionalism. The respondent also offered some compromises regarding seniority, lay-offs, and related issues. It abandoned its proposal to reduce its reliance upon part-time teachers in the 1987-88 school year and offered to maintain the status quo. Mr. Storie expressed a willingness to vary the numbers of periods per week needed to qualify for each range of seniority accumulation, and also offered to make layoff and recall decisions under Article 16 more amenable to arbitral review by removing the words "in the opinion of the College" from the final sentence of Article 16.01. He also offered to delete "including the duties set out in Article 13" from part (a) of Article 16.01. For purposes of this decision, however, it is unnecessary for the Board to conclusively determine whether or not the respondent has adopted an uncompromising position with respect to any or all of those matters as we are satisfied, for the reasons set forth below, that the respondent had (and has) reasonable justification for its bargaining position regarding each of those matters. Moreover, it may be that in any event, the matter of whether the respondent has adopted an uncompromising bargaining position can more usefully be considered in conjunction with the issue of "reasonable justification" than in isolation from that issue.

61. Respondent's counsel asked the Board to reject the interpretation of "reasonable justification" which was adopted by the Board in *Formula Plastics Inc.*, *supra*. It was his submission that "reasonable justification" should be interpreted to mean: "Is there a legitimate business related reason for the proposal that is not simply a pretext?" The adoption of that approach would, in our view, constitute an unwarranted limitation on the scope of section 40a(2)(b). In this regard, we respectfully agree with and adopt the reasoning of the Board in *Formula Plastics Inc.*, *supra*, in which the Board wrote as follows concerning the interpretation to be given to the word "reasonable" in that provision:

24. But was the employer's position taken without reasonable justification? Much depends on our interpretation of "reasonable" in this regard. Obviously the employer in this matter did have reasons for taking this position in the sense that it hoped to achieve a contract provision of benefit to itself. However, in our view, "reasonable" must mean something more than simply a rational relationship between a bargaining position and a party's self-interest. This test is so minimal that it would make the relief provided by section 40a(2)(b) virtually inaccessible, a result which we find inconsistent with the remedial nature of this provision. Reviewing the sec-

tion as a whole, and having regard to the Board's analysis in *Nepean Roof Truss*, *supra*, and *Juvenile Detention Centre (Niagara)*, [1987] OLRB Rep. Jan. 66, we find it difficult to conclude that the legislation was designed to do no more than ensure that parties were looking after their own interests in a logical way.

25. Rather, in our view, the word "reasonable" imports an objective element into our consideration of the respondent's justification for its position. It is not simply a matter of whether the justification is reasonable from the respondent's point of view, or even from the applicant's. The legislation draws us into an unavoidable assessment of whether a given proposal or position is reasonable in objective terms, a task which to some extent takes the Board into uncharted waters.

26. This is so, in part, because reasonableness is a relative concept; what is reasonable depends largely, if not entirely, upon the context in which such an examination is to be made. In considering section 40a(2)(b), such a context will include both the general landscape of labour relations and the specific labour relationship between the parties. In many cases such an assessment will also require the weighing and balancing of the opposing interests of the parties which they seek to pursue by way of their negotiating positions.

27. Moreover, while the Board has had occasion to scrutinize negotiations in the past, notably in the course of determining bad faith bargaining complaints, the nature of our inquiry under section 40a is significantly different. The jurisprudence developed under section 15 reflects a conscious intention to avoid reviewing the fairness or reasonableness of negotiating proposals as an exercise in itself (see for example, *Canada Trustco*, [1984] OLRB Rep. Oct. 1356). Rather, the Board's interest on a section 15 inquiry centers on whether a manifestly unreasonable proposal indicates the presence of bad faith on the part of a party, or a failure to make every reasonable effort to make a collective agreement. To the extent that section 40a requires us to examine the intrinsic reasonableness of a negotiating position, it represents a departure from the jurisprudence which has evolved under section 15.

62. Counsel for the respondent submitted, in the alternative, that the College has established reasonable justification, as defined in the *Formula Plastics* case, for its positions with respect to management rights, seniority, layoffs, and related issues. As indicated above, we agree with that submission. The inclusion in a collective agreement of a management rights clause of the type proposed by the respondent is by no means unusual. It is designed to clarify the respondent's power to manage the school. Moreover, as noted above, the College, through Mr. Shamie, expressed a willingness to consider, with a view to resolving, any difficulties which the Federation's bargaining committee had with any particular words in the article. However, Mr. Birket elected not to accept Mr. Shamie's repeated requests to engage in that exercise, and did not offer any counterproposal until June 24, when he offered the following provision:

The Union recognizes the right of the College to manage and conduct the business of the College except insofar as it is constrained by the terms of this agreement, and the statutes and regulations of laws of Ontario.

However, that language was unacceptable to the respondent, as it did not meet its legitimate concern about specifying its powers to manage the College, which was understandably a matter of particular concern to the respondent during a period of declining enrolment in which the school's already substantial deficit was predicted to increase dramatically.

63. The College's proposal regarding Article 13 was a reaction to the Federation's proposal regarding "working rules", which included a provision by which teachers' attendance at activities during evenings and week-ends was to be voluntary. That provision was of considerable concern to the Bd. as it saw clubs, dances, and other extra-curricular activities, which had traditionally been supervised by teachers, as being an important part of the overall program available to the College's students, many of whom boarded at the school and, unlike their public school counterparts, were not in a position to leave school and go home after their classes finished for the day. The potential

open-endedness of Article 13 was a source of legitimate concern to Mr. Birket and the other members of the Federation's bargaining committee. However, as indicated above, on August 4 Mr. Storie (and on August 31 Mr. Shamie) made a reasonable attempt to meet that concern by suggesting that a special committee be formed to deal with the administration of that provision or, more importantly in the context of the reasonableness of the proposal, that a clause be added by which the provision would be administered in accordance with existing practices. With that addition, the provision was not, in our view, unreasonable in the context of a private school with a relatively small number of teachers available to perform those functions.

64. It is clear from the totality of the evidence that the parties' disparate proposals regarding seniority, layoffs, and related issues were a major barrier to reaching a collective agreement. The College wanted to bring itself into line with its competitors by reducing its reliance on part-time teachers. Faced with the prospect of a substantial decline in enrolment, it wished to have a layoff provision which would enable it to retain the best qualified teachers. The Federation wished to maintain the status quo regarding the College's reliance on part-time teachers, and initially tabled a proposal which did not include any provision regarding layoffs. In April, the Federation responded to the "competition" layoff clause proposed by the College by tabling a provision under which layoffs would be effected in order of seniority, with the proviso that a teacher who was "the only qualified teacher for courses planned for the following year" could be retained out of order of seniority. If the respondent had maintained its initial positions regarding those matters, it would have been more arguable that the situation fell within the purview of section 40a(2)(b). However, as indicated above, the College abandoned its proposal to reduce its reliance upon part-time teachers in the 1987-88 school year and offered to adopt the Federation's position of maintaining the status quo in that regard. Moreover, Messrs. Storie and Shamie expressed a willingness to remove the words "in the opinion of the College", thereby making layoff and recall decisions under Article 16 more amenable to arbitral review. They also attempted to make the provision more acceptable to the Federation by offering to delete "including the duties set out in Article 13" from part (a) of Article 16.01. The evidence adduced in this case and the Board's experience both indicate that competition clauses of the type proposed by the College, with the modifications described above, are not unusual in collective agreements. Although such clauses may not be prevalent in collective agreements between parties, such as the Federation, whose labour relationships are for the most part governed by the *School Boards and Teachers Collective Negotiations Act*, they do exist in the educational context, as indicated by the provisions of the T.F.S. Agreement and the Community Colleges Agreement. As indicated above, the College is faced with declining enrolment, one of the major causes of which has been identified by the College to be parents' concerns about the quality of education which is being offered by the respondent. In these circumstances, we are satisfied that the College had (and has) reasonable justification for maintaining its insistence on a layoff provision with a "competition clause" format, which will enable it to retain the best qualified teachers.

65. We are also unable to characterize as unreasonable the College's position regarding accumulation of seniority by part-time employees. As indicated above, the Federation wishes to have part-time teachers accumulate seniority at the same rate as full-time teachers, notwithstanding the fact that the respondent's part-time teachers generally work only one-half or two-thirds as many hours as their full-time counterparts. As indicated above, the College views the Federation's position to be unfair and inequitable, and proposes a formula which specifies parameters (about which its representatives have displayed some flexibility) under which part-time teachers' seniority accumulation is to be pro rated. That proposal is, of course, consistent with the College's desire to reduce its future reliance on part-time teachers in order to bring itself in line with its competitors and to alleviate the concern which it has about a lack of commitment to the College on the part of some part-time teachers. The College's proposal is consistent with the approach which is generally found in collective agreement provisions regarding accumulation of seniority by part-time employ-

ees. Moreover, there is no evidence that the intent of that proposal is to discriminate against the College's women teachers, nor is there any evidence from which we can conclude that that would be the likely effect of that proposal in the circumstances of this case. Having regard to all of the circumstances, we find that the College had (and has) reasonable justification for that proposal.

66. Having carefully considered the submissions of counsel and all of the evidence, we have concluded that the process of collective bargaining has not been unsuccessful because of the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification, nor because of the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement, as alleged by the applicant.

67. For the foregoing reasons, this application is hereby dismissed.

DECISION OF BOARD MEMBER RENE R. MONTAGUE;

1. I characterise the evidence differently than my colleagues. It is clear that the process of collective bargaining has been unsuccessful in the circumstances of this case. In my view, the College has failed to make reasonable or expeditious efforts to conclude a collective agreement, and has adopted without reasonable justification an uncompromising position in respect of management rights, seniority, layoffs, workload, full-time versus part-time and related issues, for the following reasons.

2. The College brought itself within the scope of section 40a(2)(c) by not agreeing to meet more frequently, and by not providing its negotiating team, including Mr. Shamie, with a proper mandate to negotiate. Negotiations opened in December of 1986 and it was not until August 31, 1987 that the College's representatives said to the Federation's full bargaining committee, "Today we are going to put to you our best settlement position - one that the three of us are willing to recommend". With respect to section 40a(2)(b), I believe the evidence shows the College has adopted, without reasonable justification, an uncompromising bargaining position with respect to management rights, seniority, layoffs and related issues. It is true that the College is insistent upon having a management rights clause included in the collective agreement, and I do not find that to be an uncompromising bargaining position, nor one which lacks reasonable justification. However, if one looks at the clause submitted by the College, which Mr. Shamie indicated to be of prime importance to the College in order to run the school, one can only conclude that it is totally unrealistic and unreasonable. Further, Mr. Shamie testified in evidence, "It's *virtually* a carbon copy of the management rights clause in the Toronto French School Collective Agreement." In reviewing Exhibit R8, I find that the management rights clause in the T.F.S. Agreement is the same as that proposed by the College with *two major exceptions* (which I now quote from the T.F.S. Agreement):

3.02 The Employer agrees that it will not exercise its functions in a manner inconsistent with the provisions of this Agreement.

3.03 The exercise of any of the above rights may be the subject matter of a grievance and/or arbitration as provided for in this Agreement.

3. With those important additions, the clause proposed by the College might have been somewhat more acceptable to the Federation. However, in proposing a broad management rights clause without them, the College adopted an uncompromising position without reasonable justification.

4. As regards the College's proposal on Article 16 (layoff and recall), absolutely no com-

parison can be drawn to the comparable article in the T.F.S. Agreement, which provides as follows:

ARTICLE 11

SURPLUS/REDUNDANCY

AFFECTING SENIORITY TEACHERS

11.01 In the event of a surplus staff situation involving teachers with seniority, any necessary reduction in staff shall be conducted pursuant to the following procedure:

- (a) The Employer shall determine the employees to be terminated and so notify the Alliance in writing.
- (b) In the event that the Alliance is of the view that other employees than those designated by the Employer ought to be laid off, the Alliance may, within ten working days, submit the matter to a Review Panel for consideration by it.
- (c) The Review Panel shall consist of three members,
 - (i) the President of the Alliance or his designate;
 - (ii) the Chairman of the Board of Directors of the School or his designate who shall not be a remunerated official of the School;
 - (iii) the Principal of the School or his designate.

The decision of a majority of the Review Panel shall be the decision of the Panel.

- (d) Should either the Alliance or the Employer be dissatisfied with the decision of the Review Panel, the matter may be submitted to arbitration within ten working days of the date of the decision of the Review Panel.

11.02 For the purposes of this Article, which shall include the decision of the Employer, any consideration by the Review Panel or an Arbitration Board, a reduction or recall of employees shall be based on the following factors:

- (a) academic and professional qualifications; teaching proficiency; ability and effectiveness of the teacher; experience and ability to teach the required subject materials and the requirements of the Employer's programmes; or in the case of a non-teacher, skill, ability and qualifications to perform the required duties; and
- (b) seniority with the Employer.

When the matters in factor (a) are relatively equal then factor (b) shall govern.

11.03 Employees declared surplus shall be placed on a mailing list and for a period of two years after termination shall be given first consideration for vacant positions in accordance with the principles contained in Article 11.02.

11.04(a) Should a reduction in the number of teachers be required for any reason other than an indicated decline in enrollment, the School will provide notice to the teacher of the possible termination of contract no later than November 30th in respect of the succeeding academic year.

- (b) Notice of possible termination of contract shall be provided to a teacher arising out of an indicated decline in enrollment no later than April 30th in respect of the succeeding academic year. Notice prior to April 30th will be provided if possible. Should no decline in enrollment occur the notices shall be withdrawn.

- (c) Indicated decline in enrollment shall mean any anticipated decline in either the total number of students at a Division or Branch or an anticipated decline in the number of students in a particular subject or course, as determined by the School in its discretion and based on the evidence available to the School at that time.
- (d) Notwithstanding the provisions of the above clauses, the School may terminate all or substantially all of the operations of any Adult Education Department of the School at any time where in the opinion of the Employer the continued operation of that Division is not in the best interest of the School, but any employees made surplus because of such action shall receive a minimum of four months' advance notice or, if the period of notice is less than four months, be paid at normal rates for such period by which the notice is less than four months. Adult Education Department teachers who are regarded as surplus shall be given first consideration for other positions in the School that become vacant, and for which there is not an eligible applicant under the provisions of Article 11.03, provided the teacher, in the reasonable judgment of the School, is qualified for such a position.
- (e) Nothing in the foregoing clauses shall oblige the School to maintain the employment or remuneration of employees in those circumstances where the School is forced, by reasons beyond its control, to discontinue all or a part of its operations. The foregoing shall not entitle the Employer to discontinue the employment of an employee who engages in a lawful strike against it in accordance with the provisions of the Labour Relations Act.

5. Once again it is apparent that the College has proposed only part of the pertinent provisions from the T.F.S. Agreement and, in the absence of the balance of those provisions, I find that it has adopted without reasonable justification, the following uncompromising position:

Article 16 - Lay-off and Recall

16.01 In cases of lay-off and recall the following factors shall be considered:

- (a) academic and professional qualifications; teaching proficiency; ability and effectiveness of the teacher; experience and ability to teach the required subject materials and the requirements of the College's programmes, including the duties set out in Article 13.
- (b) seniority with the employer.

When the matters in factor (a) are relatively equal in the opinion of the College, then factor (b) shall govern.

16.02 Employees declared surplus shall be placed on a mailing list and for a period of two years after termination shall be given first consideration for vacant positions in accordance with the principles contained in Article 16.01.

The College's representatives did offer in August of 1987 to remove the words "in the opinion of the College" from the final sentence in Article 16.01, and also to delete "including the duties set out in Article 13" from Article 16.01(a). However, those were merely cosmetic changes in my view.

6. With respect to the part-time seniority issue, Article 23 of the T.F.S. Agreement reads as follows:

23.01 Remuneration, seniority and years of teaching experience in respect of any part-time teacher normally scheduled to teach ten or more periods a week shall be determined on the basis of the following accumulation of seniority:

20 periods or more a week - 1 year of seniority for each year worked

10 - 19 periods a week - 1/2 year of seniority for each year worked

less than 10 periods a week - no seniority

23.02 A part-time teacher who has acquired seniority and who is normally scheduled to teach ten or more periods a week may exercise seniority, in accordance with the principles contained in Article 11.02, in the event of a reduction in the number of teachers, in respect of any other part-time teacher with less seniority, and in respect of a full-time teacher with less seniority only in accordance with the following provisions:

- the part-time teacher may exercise seniority in respect of a full-time teacher with less seniority only if the part-time teacher is prepared to accept full-time duties;
- in the alternative, with the concurrence of the Employer (which concurrence will not be unreasonably withheld), and with the concurrence of all teachers directly affected, the teaching time available may be shared between the part-time teacher and a full-time teacher with less seniority on a rational basis not inconsistent with the needs of the School and the maintenance of appropriate standards of teaching.

23.03 It is recognised that the number of teaching periods assigned to part-time teachers may vary from year to year with the requirements of the School.

23.04 Part-time teachers shall be responsible for the performance of additional duties and additional responsibilities as set out in Article 19 of this Agreement. Part-time teachers shall attend [sic] all staff meetings.

Again the College's proposal falls far short of the T.F.S. Agreement's pro rating of seniority for part-time employees. Moreover, I disagree with the pro rating system. I see seniority as being the starting date with an employer, and I am of the view that it should not be subject to change. Therefore, I would find the College has adopted, without reasonable justification, an uncompromising position in respect of accumulation of seniority by part-time teachers.

7. Mr. Shamie and Mr. Storie went to great lengths in their testimony to state that most of the major proposals in question came from the T.F.S. Agreement. However, the clauses cannot be taken in isolation from the rest of the language in those provisions and the collective agreement as a whole. Otherwise, there will not be a true reflection of what the clauses were really intended to mean, when they are taken out of context the way they were in the College's proposals.

8. We also heard a lot of testimony that the College used the T.F.S. Agreement because it was the only pertinent private school collective agreement in the province. It should be noted that the T.F.S. is a private *day* school. The College, on the other hand, is a private *boarding* school. Thus, the only similarity is the word *private*, and a collective agreement which might well fit in the T.F.S. (private day school), will not fit or meet the needs of the teachers of a private boarding school.

9. The teachers joined the Federation, which went into collective bargaining to provide job security, which is *the essence of unionism*, and better working conditions. Collective bargaining should not now *be used by the College to correct, at the expense of the teachers*, its deficit, which was there prior to the Federation coming on the scene.

10. The unresolved clauses are the crux of any collective agreement and the Federation recognises that agreeing to such clauses in the form proposed by the College would mean sheer destruction of the Federation, and absolutely no job security for any of its members at the College.

11. Teachers who join a union should not be faced with losing rights and privileges they enjoyed prior to the union coming on the scene. In the totality of the circumstances of the present

case, including the College's deficit, the serious outstanding issues, and the length of time collective bargaining has taken, I am firmly of the opinion that the situation *cries out* for a first contract arbitration direction.

12. As a result of the majority decision, the Federation now has but one recourse - confrontation - and that, it is my understanding, *was what the legislation was meant to prevent*.

1693-87-R Labourers' International Union of North America, Local 1089, Applicant v. Catalytic Maintenance Inc., Respondent

Certification - Membership Evidence - Practice and Procedure - Parties executing minutes of settlement agreeing on all points except whether the Board should count membership cards signed by individuals after their last day worked - Parties' request for a hearing to make argument on that issue denied - No facts in dispute - More appropriate to receive written submissions

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *G. O. Shamanski* and *B. L. Armstrong*.

DECISION OF THE BOARD; December 16, 1987

1. This is an application for certification.
2. In a decision of the Board dated October 19, 1987, the Board determined the unit of employees appropriate for collective bargaining and appointed an Officer to meet with the parties and inquire into the list and composition of that bargaining unit. The Board also noted that in at least two instances the evidence of membership submitted by the union indicated a signature date *after* the subject employee was terminated. In this regard the Board directed the parties' attention to the policy enunciated in such cases as *Hardman Industries Limited*, [1982] OLRB Rep. March 388 and *Amplifone Canada Ltd.*, [1967] OLRB Rep. Dec. 840.
3. Following the appointment of the Officer, the parties entered into minutes of settlement which provide as follows:

MINUTES OF SETTLEMENT

1. The parties agree that the correct list of employees on the application date is as contained on Appendix "A", attached hereto. The parties further agree that these individuals were permanently laid-off [sic] and their last day of work was as shown on Appendix "A".
2. The parties remain in dispute as to whether the Board should count the membership cards, if any, signed by individuals on Appendix "A", after their last day worked. The parties agree to the following facts in regards to these individuals, these facts [sic] along with those contained in paragraph 1, above, constituting all the facts either party wishes to rely upon in this dispute:
 - (a) On their last day worked the individuals were told by a managerial employee of the respondent that they would be laid-off [sic] permanently beginning at the end of the shift that day.

(b) The individuals were in fact permanently laid-off. [sic]

3. The parties request that the Board convene a hearing so as to allow the parties opportunity to make argument to the dispute as set out in paragraph 2, above.
4. The parties hereby waive a formal officer's report in this matter.

(For ease of reference, Appendix "A" has been omitted. We should also note that there are only two membership cards in dispute. In each case the individual signed his/her card after his/her last day worked but prior to the terminal date. If these two cards are counted, the trade union is in a position to be certified without recourse to a representation vote. If they are not counted, a representation vote will be necessary.)

4. The parties have requested that the Board convene a hearing so that they can make argument about the above-noted issue; however, since there are no facts in dispute, the Board considers it more appropriate to receive their written submissions (which should include any Board jurisprudence or labour relations policy considerations which the parties may consider relevant). The parties will have 30 days from the date hereof to file those submissions with the Board and a further 10 days to file their written replies (if any).

5. Although not legally seized with this matter, it will be convenient for the present panel to deal with it.

0354-86-R Employees of Corecon Construction, Applicant v. Local 27, United Brotherhood of Carpenters and Joiners of America, Respondent v. Corecon Construction Limited, Intervener

Bargaining Unit - Termination - Challenge to list of employees filed by the employer on the basis that the three individuals in question could not have performed any bargaining unit work but for the employer's violation of the collective agreement - Three individuals not having status as bargaining unit employees and therefore not properly on the employee list - Application dismissed

BEFORE: *R. A. Furness*, Vice-Chair, and Board Members *R. Montague* and *J. Trim*.

APPEARANCES: *Ray Connolly* for the applicant; *J. David Watson* and *John Cartwright* for the respondent; *W. J. McNaughton* and *D. Burness* for the intervener.

DECISION OF THE BOARD; November 27, 1987

1. The name of the respondent appearing in the style of cause of this application is amended to read "Local 27, United Brotherhood of Carpenters and Joiners of America".
2. The applicant has applied to the Board under section 57 of the *Labour Relations Act* for a declaration that the respondent no longer represents the employees in the bargaining unit for which it is the bargaining agent.
3. During the course of the hearings in this application; Ms. J. Trim was, on the consent of the parties, substituted in place and stead of Mr. J. Wilson.

4. In a decision dated May 6, 1985, a differently constituted panel of the Board, after a keenly contested application for certification, certified the Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America with respect to a bargaining unit of employees of Corecon Developments defined as:

all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman. (See Board File No. 0814-84-R)

5. The instant application was filed on April 28, 1986, and was first listed for hearing on July 29, 1986. In a letter dated July 23, 1986, Corecon Construction Limited, as the successor in the construction industry to Corecon Developments, requested reconsideration of the decision of the Board dated May 6, 1985, in Board File No. 0814-84-R. It was common ground that the Board had not yet entertained the request for reconsideration in Board File No. 0814-84-R. It was on this basis that the parties proceeded with this application and the Board inquired into this application. It was agreed by the parties that Corecon Construction Limited was the successor of Corecon Developments.

6. The intervener filed a list of employees containing the following names and classifications:

Cabral, E. Apprentice
Connolly, R. Carpenter
Ribeiro, M. Carpenter

The applicant filed a statement of desire which contained three signatures. The respondent challenged the list of employees which had been filed by the intervener. The respondent's position was twofold. Firstly, the three individuals in question could not have performed any bargaining unit work but for the intervener's violation of the union security and other provisions of the collective agreement between The Carpenters Employer Bargaining Agency and The Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America, Ontario Provincial Council, effective from May 1, 1984, to April 30, 1986 (the "collective agreement"). It was therefore the position of the respondent that the three individuals in question were not properly included on the list. Secondly, quite apart from the intervener's alleged violation of the collective agreement, it was the position of the respondent that it had not been satisfactorily established that any of the three individuals in question would be properly considered as employees in the bargaining unit during the relevant time period. It was the position of the respondent that Mr. Connolly was a superintendent and therefore not properly included in the bargaining unit. With respect to Mr. Cabral, it was the respondent's position that he was not performing carpentry work for the majority of the time. It was also the position of the respondent that Mr. Ribeiro was a superintendent and therefore also not properly included in the bargaining unit. After entertaining the representations of the parties the Board ruled orally at the hearing that because the respondent had challenged the list of employees on these two grounds, the respondent was required to proceed and call its evidence.

7. The parties adduced evidence with respect to the second ground relied upon by the

respondent in its challenge to the list. The evidence covered aspects of the work performed by Mr. Cabral and Mr. Connolly with limited evidence and the work performed by Mr. Ribeiro during the period from prior to the summer of 1985 until April of 1986. Clearly Mr. Ribeiro and Mr. Connolly performed supervisory work from time to time. It is equally clear that on occasions Mr. Ribeiro and Mr. Connolly worked with the tools on carpentry work. Mr. Cabral also worked for period of time performing labouring work and also performed some aspects of carpentry work and the intervener self-styled Mr. Cabral as an "apprentice carpenter". These three persons appear to have moved in and out of performing the work of a carpenter. Unfortunately, the evidence before the Board did not always clearly indicate even approximately when these three persons performed the work of carpenters. On the evidence before it, the Board is not prepared to delete any of the names from the list of employees on the basis that they were not performing the work of carpenters on the date of the filing of this application.

8. The first ground advanced by the respondent arises from the terms of the collective agreement which is binding on the parties. It was the position of the intervener that all three individuals performed carpentry work and were carpenters at all material times. It was the uncontradicted evidence of John Cartwright, the business representative of the respondent, that Mr. Connolly signed an application for membership and paid one dollar in connection therewith and that neither Mr. Cabral nor Mr. Ribeiro signed applications for membership. In order to understand the evidence which will subsequently be referred to it is necessary to consider the articles of the collective agreement which the respondent claimed were violated by the intervener. These articles are 5.01(a), 5.01(b), 5.01(c), 5.01(d), 5.06, 5.11, 17 and the Carpenters' Appendix with respect to the Board's geographic area number 8. The articles provide as follows:

ARTICLE 5 - UNION SECURITY

5.01(a) The employer agrees to hire and continue to employ employees covered by this Agreement who are members in good standing of the United Brotherhood of Carpenters and Joiners of America as long as the Local Union or the District Council of the United Carpenters and Joiners of America in the Province of Ontario can supply qualified employees in sufficient numbers who are capable of performing the work required.

(b) Except as modified by the provision of sub-section (c) of this Article, all employees covered by this Agreement shall be hired by the employer through the offices of the Local Unions and District Councils having jurisdiction over the geographical area, set out in Schedule "B", where work by the employer is to be performed. Such hiring shall be done by way of a referral slip issued by the Local Union or District Council.

(c) It is understood that, if the Local Union or District Council is unable to provide the required manpower within two (2) working days, the employer is free to hire such manpower as is available, but such manpower shall, as a condition of employment, either be in good standing or apply for membership in the Union within seven (7) days.

(d) As a condition of continuing employment, all employees must maintain membership in good standing in the Union.

5.06 A member, at date of recall, must be in good standing in the Union and be registered as unemployed with the Local Union or District Council in the area where the work is to be performed. Before commencing work the member must be given a referral slip.

5.11 All referral slips issued under the provisions of this Article must be given to the steward before commencing work.

ARTICLE 17 - APPRENTICES

17.01 The use of apprentices shall be encouraged and their improvement will be advanced by a

properly operated apprenticeship program actively administered by apprenticeship advisory committees of three (3) members from the Union and three (3) members from the EBA. The quorum for the meetings of such committees shall be three (3) members provided that, if both parties are represented, the members of each party shall have equal voting rights.

17.02 The EBA shall actively participate in the formation of a local apprenticeship advisory committee and appoint member delegates to attend committee meetings at all times.

17.03 The Union shall accept as members of the Union apprentices that are indentured to an employer or the local apprenticeship advisory committee. The apprenticeship advisory committee shall have full powers over the training, education and movement of all apprentices.

17.04 Any examination or entry qualifications shall be at the sole discretion of the apprenticeship committee and the method applied to any examination or entry qualification shall be the responsibility of the apprenticeship committee.

17.05 The number of apprentices shall be as established by the Trade Schedule under the Apprenticeship and Tradesmen Qualifications Act, R.S.O., 1970 c. 24 as amended.

The Carpenters' Appendix to the collective agreement with respect to the Board's geographic area number 8 sets forth the wage and related payments for regularly scheduled daytime hours.

9. There was no dispute that none of these three individuals either obtained referral slips from the respondent or were registered as unemployed with the respondent. The Board heard evidence on the various conversations between Mr. Cartwright, Mr. Connolly, Mr. Burness, the former president of Corecon Construction Limited, Al Vellani, an employee of Corecon Construction Limited, and James Smith, a business representative of the respondent. Evidence was adduced concerning the steps which were necessary in order to be a member in good standing, the practice in the construction industry with respect to hiring, the practice of the respondent with respect to its members seeking employment and the effect of the payment, tendering and return of monies paid by the intervener to the administrator of The Carpenters' District Council of Toronto & Vicinity Benefit Trust Fund.

10. In considering the evidence adduced before the Board, it is clear that there are contradictions in the evidence of the witnesses with respect to the conversations which occurred among them. In the opinion of the Board, Mr. Cartwright and Mr. Smith gave their evidence in a forthright manner and appeared to have a better recollection of the events which occurred. While Mr. Burness and Mr. Connolly also gave their evidence in a forthright manner, in the view of the Board their recollection of the events appeared to be less vivid in many aspects. For example, there was never any satisfactory explanation for the discrepancy arising over the commencement of Mr. Connolly in performing carpentry work in December of 1985 and the commencement of the intervener in paying certain deductions to the respondent at an earlier time. In addition, it appeared that the intervener as represented by Mr. Burness was inclined to act in an arbitrary manner without reference to its obligations with respect to the arbitrary assignment of wages to Mr. Cabral. The assignment of wages of a second year apprentices to Mr. Cabral was done despite the fact that he have never been in any manner registered as a carpenters' apprentice. In addition, the Board notes that, with respect to Mr. Connolly, while he gave evidence regarding his dissatisfaction with the conduct of the union in not providing him with any benefits during the period when the intervener was advancing remittances on his behalf, there was no evidence that he, in fact, made any claims or sought to ensure that he was properly registered for his entitlement to benefits. Despite the fact that Mr. Connolly was given a booklet describing the welfare and pension plans for which he would be eligible, he made no attempt to pursue these matters even though he was given the address and the telephone number of Mr. Cartwright. Mr. Connolly never adequately accounted for these inconsistencies in his conduct.

11. The Board finds that in the two conversations between Mr. Cartwright and Mr. Connolly at the latter's home, Mr. Cartwright informed Mr. Connolly that he could become a member in good standing of the union and informed him of the dues that had to be paid in order to accomplish this status. The Board accepts the evidence of Mr. Cartwright that he stated that there would be an initiation fee of two hundred dollars and a first monthly dues payment of thirty-two dollars followed by subsequent monthly dues payment of twenty dollars as over the counter dues which would be recorded in a dues book. There is no dispute that Mr. Connolly did not do this. And there is also no dispute that neither Mr. Cabral nor Mr. Ribeiro ever applied to join the respondent. The Board finds that Mr. Cartwright informed Mr. Connolly of the benefits which were available to members in good standing of the respondent and that Mr. Cartwright expressed concern when he discovered from Mr. Burness that Mr. Connolly would not be included in the bargaining unit after certification and would therefore, to the regret of Mr. Cartwright, not be eligible for any of the benefits under the respondent's collective agreement and health and welfare plans.

12. There is no dispute on the evidence that neither Mr. Connolly nor Mr. Cabral nor Mr. Ribeiro ever obtained referral slips from the respondent before allegedly performing the work of a carpenter in the employ of the intervener. Article 5 of the collective agreement makes it quite clear that a condition of employment and continued employment is conditional upon an employee in the bargaining unit maintaining membership in good standing in the union. Moreover, it is quite clear in Article 5 that the hiring of an employee shall be done by way of a referral slip issued by either the Local Union or the District Council. It is also clear in Article 5 that a member at the date of recall must be in good standing in the union and be registered as unemployed with the Local Union or District Council in the area where the work is being performed. None of these three persons, namely, Messrs. Connolly, Cabral and Ribeiro ever registered as being unemployed in the manner prescribed in Article 5. In addition, the provisions of Article 17 of the collective agreement respecting apprentices were similarly not complied with in any respect in the case of Mr. Cabral.

13. On the basis of the evidence before it, the Board is not prepared to find that any of these three persons were hired or employed by the intervener in accordance with the provisions of the collective agreement. It was argued before the Board that there ought to be no necessity to comply with the provisions of the articles referred to, particularly, Article 5 in the case of persons who were employees of the intervener and who were transferred in and out of the bargaining unit. The Board does not agree with this argument. The effect of moving a person into the bargaining unit contained in the collective agreement is under the collective agreement the same as hiring a person for the first time. The particular circumstances in this application with respect to the employment of the persons on the list of employees filed by the intervener arose from the fact that the intervener, upon certification, moved the employees out of the bargaining unit. The work was then subcontracted to other employers who were in contractual relations with the respondent. While it would have been possible, according to the evidence before the Board, to have name-hired the persons who are affected by this application, there existed a very clear requirement that these persons had to become and remain members in good standing in order to work for the intervener. On all of the evidence before the Board, there can be no doubt that three persons on the list of employees were hired to perform work in the bargaining unit contrary to the provisions of the collective agreement.

14. While the intervener remitted monies to the administrator with respect to periods of employment for the persons on the list of employees, the Board finds that such monies were returned once the officers of the respondent became aware that the monies had been remitted to the administrator of the various plans. The inadvertent acceptance and subsequent return of these monies does not, in our opinion, in any way regularize the conduct of the intervener and the employees on the list in performing work within the scope of the bargaining unit in the collective

agreement. Such monies are properly the property of the employees of the intervener from whom such monies were deducted. In our opinion, such monies ought to be returned to these employees.

15. In representation proceedings a principle laid down by the Board in *April Waterproofing Limited*, [1980] OLRB Rep. Nov. 1577 applies to the facts in this application. At page 1578 of that decision the Board stated as follows:

There can be little doubt but that at the relevant time there existed a common-law employee-employer relationship between the respondent and the three individuals challenged by the intervener. That by itself, however, is not determinative of their status as bargaining unit employees. See *Local 273, International Longshoremen's Association v. Maritime Employer's Association* [1979] 1 S.C.R. 120. In our view, the bargaining unit is comprised of employees employed under the terms of the applicable collective agreement. To be so employed, an employee must have been hired in accordance with the provisions of the agreement. The three individuals in dispute were not hired in accordance with the provisions of the collective agreement and accordingly, in our view, they do not come within the bargaining unit covered by the collective agreement. This being so, we are satisfied that in ascertaining the number of employees in the bargaining unit for the purposes of section 7(1) of the Act, the three individuals in dispute should not be taken into account.

In ascertaining the number of employees in the bargaining unit at the time the application was made under section 57(3) of the Act, the Board finds that the three persons referred to in paragraph 6 herein are not properly included on the list of employees.

16. On the basis of the evidence and representations before it, the Board is satisfied that less than forty-five per cent of the employees of Corecon Construction Limited in the bargaining unit, at the time the application was made, had voluntarily signified in writing that they no longer wish to be represented by the respondent trade union on June 26, 1986, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent trade union under section 57(3) of the said Act.

17. In the result, this application is dismissed.

1054-87-R The International Brotherhood of Electrical Workers, Local Union 894, Applicant v. **County Electric of Peterborough Limited**, Respondent v. Group of Employees, Objectors

Certification - Membership Evidence - Form 80 rejected in earlier certification application because proper inquiries had not been made by the Form 80 declarant - New Form 80's filed in this application - No grounds for barring this application - Earlier decision *res judicata* only with respect to the earlier Form 80 - Board prepared to rely on the evidence of membership and the new Form 80's - Certificates issuing

BEFORE: R. A. Furness, Vice-Chair, and Board Members J. Redshaw and G. O. Shamanski.

APPEARANCES: N. W. Meikle, R. Hill, T. Kelsey and D. Cunningham for the applicant; Donald White and Edward McIlwain for the respondent; Tim Perks for the objectors.

DECISION OF THE BOARD; December 14, 1987

1. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on December 12, 1977, the designated employee bargaining agency is the International Brotherhood of Electrical Workers and the IBEW Construction Council of Ontario.

2. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

3. The Board further finds, pursuant to section 144(1) of the Act, that all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all electricians and electricians' apprentices in the employ of the respondent in all other sectors in the County of Peterborough (except for the geographic Township of Cavan), the County of Victoria (except for the geographic Township of Manvers) and the provisional County of Haliburton, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

4. The respondent requested the Board to refuse to entertain this application pursuant to the provisions of section 103(2)(i) of the *Labour Relations Act* on the grounds that the application had been made within ten months of the dismissal of an earlier application (see Board File No. 0327-87-R). The respondent also requested the Board to dismiss the instant application because it appeared that in the earlier application the same evidence of membership and declarations under Form 80 had been used in support of the instant applicant. It was the position of the respondent that since the previous material was found to be inadequate, the instant application ought to be dismissed for the same reasons. The applicant opposed the requests of the respondent and asked the Board to grant certification to it on the basis of the evidence filed in the instant case.

5. The respondent argued that the earlier decision of the Board in File No. 0327-87-R made the issues before the Board with respect to the membership evidence and the Form 80 *res judicata*. The applicant argued that there was neither a taint nor a cloud upon the membership evidence and that the earlier application had been dismissed by virtue of a deficiency in the Form 80. It was the position of the applicant that since new Form 80's had been filed and since there was no deficiency in the earlier membership evidence, the Board ought to rely upon the membership evidence before it in this instant application. It was the position of the applicant that a simple mistake

had been made by the business agent in the earlier application and that this ought not to lead the Board to find that the conduct of the applicant was anything more than a simple mistake.

6. After entertaining the submissions of the parties, the Board ruled that there were no grounds for barring the instant application under the provisions of section 103(2)(i) of the *Labour Relations Act*. The Board also ruled at the hearing that the earlier decision was *res judicata* only with respect to the earlier Form 80 filed by the business agent of the applicant. The Board ruled also that there was no deficiency in the membership evidence found by the previous panel and that the previous decision had merely stated that since the proper inquiries had not been made by the Form 80 declarant that it could not place any weight on the applicant's evidence of membership. The Board informed the parties that two new Form 80's had been filed with the Board and that they had been filed by different persons and not by the business agent of the applicant. The Board therefore informed the parties that it was prepared to rely upon both the evidence of membership and the new Form 80's which had been filed in the instant application.

7. There was filed in opposition to this application a document which contained the names of six employees of the respondent. However, as the Board pointed out at the hearing, there was no overlap between the names of the persons who had signed evidence of membership and the persons who had signed the document in opposition to this application. In these circumstances, the Board announced that it was not material to this application and that the Board therefore was not prepared to inquire into the origination, preparation and circulation of the document filed in opposition to this application.

8. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on October 23, 1978, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

9. The respondent and the objectors asked the Board to consider ordering a representation vote in this matter. Under the provisions of section 7 of the *Labour Relations Act*, the Board has a discretion whether or not to order a representation vote. In the circumstances of this application, there is neither taint nor cloud on the membership evidence which was filed in support of this application. In these circumstances, the Board finds no reason to direct, in the exercise of its discretion, the holding of a representation vote.

10. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

..., the Board shall certify the trade unions as the bargaining agent of the employees in the *bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

[emphasis added]

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph one above in respect of all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

11. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all electricians and electricians' apprentices in the employ of the respondent in the County of Peterborough (except for the geographic Township of Cavan), the County of Victoria (except for the geographic Township of Manvers) and the provisional County of Haliburton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

1049-87-U John Craddock, Ray Buttineau, James Craddock, Blair Small, Mike Pepe, Bryan Johnstone, Dave Clemett, Mark Gaudet, J. D. Colling, Dietrich Buchwald, Ron Brown, Al Johns, Graham Marr, Peter Martin, Paul Schildroth, Keith Dadswell and Mike Petter, Complainants v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 527, Respondent

Duty of Fair Referral - Duty of Fair Representation - Intimidation and Coercion - Unfair Labour Practice - Union revoking permission granted complainants to work at Hydro - Complainants refusing to pay fines imposed for continuing to work - Union refusing to refer complainants out of hiring hall - Complaint of unfair labour practices dismissed

BEFORE: *Ken Petryshen*, Vice-Chair, and Board Members *R. J. Gallivan* and *C. A. Ballentine*.

APPEARANCES: *John Craddock, James Craddock, Paul Schildroth, Keith A. Dadswell and Ray Buttineau* for the complainant; *N. W. Meikle and Jack Porter* for the respondent.

DECISION OF THE BOARD; December 8, 1987

1. This complaint is amended to reflect the fact that the complainants are John Craddock, Ray Buttineau, James Craddock, Blair Small, Mike Pepe, Bryan Johnstone, Dave Clemett, Mark Gaudet, J. D. Colling, Dietrich Buchwald, Ron Brown, Al Johns, Graham Marr, Peter Martin, Paul Schildroth, Keith Dadswell and Mike Petter. The name of the respondent is amended to read: "United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 527".

2. This is a complaint under section 89 of the *Labour Relations Act* which alleges that the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 527 (hereinafter referred to as "Local 527") has contravened sections 3, 62(2), 68, 70, 71, 74, 78 and 135(2a) of the Act.

3. John Craddock testified on behalf of the complainants. Counsel for Local 527 called Jack Porter as a witness. In making its factual determinations, the Board has considered all of the oral and documentary evidence, the credibility of the witnesses and the parties' submissions.

4. Craddock is a licensed plumber with welding qualifications and has been a member of Local 527 since December 1969. The majority of the remaining complainants are steamfitters and a few are welders. As far as the material facts giving rise to this complaint are concerned, Craddock and the other complainants are in essentially the same position.

5. During the month of August 1986, Craddock worked at the Honda Plant at Allison. Prior to this job, he had been unemployed for approximately seven months. In September 1986, Craddock and the other complainants succeeded in obtaining work with Ontario Hydro ("Hydro") at the Bruce Nuclear Generating Station as temporary mechanical maintainers ("TMM"). Although initially it was expected that the work would last for approximately six weeks, the majority of the complainants worked as TMM's until December 24, 1986. While performing the work of a TMM, the complainants were covered by the terms of a collective agreement between the Canadian Union of Public Employees ("CUPE") and Hydro. Before accepting the job with Hydro, the complainants approached Local 527 requesting permission to take the jobs. They spoke to Jack Porter, the Business Manager of Local 527 for the past nineteen years. Porter told the complainants that they could take the Hydro jobs since their presence at Hydro might assist Local 527 in its organizing efforts. But Porter warned the complainants that Local 527 may call them off the job at some point in time in the future.

6. In early October 1986, a special meeting of building trade unions, including Local 527, was held in Kitchener. The use by Hydro of TMM's under the CUPE agreement was discussed. The building trade unions were fearful that this development would have the effect of considerably reducing the work opportunities at Hydro for their members. In Porter's view and in the opinion of other building trades representatives, a substantial portion of the work which had been performed previously by their members under various agreements with Hydro would be performed by CUPE members under CUPE's maintenance agreement with Hydro. The fact that Hydro filled the TMM positions with persons who were members of the building trade unions or persons who had the qualifications of these members was confirmation to the building trades representatives that the work being performed by their members was within the jurisdiction of their respective trades. It was resolved at the meeting that the various building trade unions would address their concerns by ensuring that their members did not work for Hydro "non-union" in the sense of working outside of the hiring hall system.

7. In mid-October 1986, Porter convened a meeting of UA members working for Hydro as MTT's at his office. In order to attend this meeting the complainants obtained permission from Hydro to take a day off work. During the course of the meeting, Craddock acted as the spokesman for the complainants. Porter advised the complainants that Local 527 was directing them to quit the Hydro job and made reference to the recent special meeting of the building trades. Craddock explained to Porter that quitting the Hydro job would cause the complainants considerable hardship since there was no other work in Local 527's jurisdiction. He pointed out as well that many of the complainants were not entitled to claim UIC benefits while those who could make such a claim risked disentitlement by quitting. Having concern for the plight of these members, Porter left the meeting and contacted the business manager for U. A. Local 463 in Oshawa. After explaining the situation to him, the Local 463 business manager agreed to permit the complainants to work at Darlington under Local 463's jurisdiction. Porter described the accommodation as an effort to even out the work around the province among the local unions and something which was not uncommon. Porter returned to the meeting and advised the complainants that any one of them could get a travel card and work at Darlington. Porter advised the complainants that if they refused to quit the TMM jobs at Hydro, they would likely be charged under the Union's constitution. Two U. A. members elected to work at Darlington. The complainants chose to continue working at Hydro. Craddock testified that they did not want to go and work at a location two hundred miles from their homes for less money. They also were of the view that it was not proper for them to take the Darlington jobs. There were members of the U. A. who were paying travel card dues and had waited for an opportunity like the one presented to the complainants. The complainants suggested that it was not right for them to take the Darlington jobs when other members had a greater entitlement to them.

8. Charges were filed against the complainants pursuant to section 204(a) and (b) of the U. A. Constitution. Those provisions read as follows:

SEC. 204.(a) a member shall not perform any work that comes within the work jurisdiction of the United Association for an employer who is not a party to a collective bargaining agreement entered into either by a Local Union or the United Association.

(b) No member may be employed in an industrial plant on any work, whether it be construction, maintenance or modernization, that comes within the work jurisdiction of the United Association where the Local Union does not have a collective bargaining agreement with the industrial plant or where the wage rate and terms and conditions of employment in the plant are less than the standards established in the Local Union's agreement, unless the member has, prior to employment in such a plant, obtained the consent of the Local Union Executive Board.

The charges were forwarded to the Local 527 Executive Board. The Trial Board consisted of the five members of the Executive Board. The chairman of the Trial Board had initiated the motion for trial and the person who seconded the motion was also on the Trial Board. The Business Manager, who was the charging party, and the Business Agent were present at the trial. The trial was held on December 12, 1986 and required the complainants to obtain Hydro's permission to take that day off. The complainants argued that by working for Hydro as MTT's they were not working within the U. A. jurisdiction. The complainants eventually were notified that they were convicted. Members of Local 527 were fined \$2,000.00 and were denied a voice or vote in the Local for a year. Members who were working in Local 527's jurisdiction on travel cards were fined \$500.00. Section 214(b) of the U. A. Constitution provides that approval must be obtained from the General Executive Board for penalties exceeding \$500.00. In this instance, Local 527 did obtain the necessary approval from the General Executive Board.

9. The complainants appealed their convictions and penalties. As a part of the appeal process, R. Watson, a U. A. international representative, held meetings with all interested parties, including the complainants. For the most part, the complainants' appeals were denied. The General Executive Board reduced the fines for the travel card violations from \$500.00 to \$250.00 but upheld the \$2,000.00 fine imposed on the Local 527 members.

10. For the period from December 24, 1986 until March 30, 1987, the complainants were unemployed. From the beginning of April 1987 to the end of September 1987, the complainants again worked for Hydro as TMM's without the approval of Local 527.

11. Most of the members of Local 527 have not paid their fines. In order to get on the Local's out-of-work list and be referred to a job, a member must be in good standing with the Local. For those members of Local 527 who have not paid their fines, Local 527 has rejected their dues and has not permitted them to go on the out-of-work list. Those persons convicted of travel card offences did pay their fines. When they attempted to return to Local 527's jurisdiction to work again for Hydro as TMM's, their travel cards and dues were returned to their own local by Local 527.

12. Effective November 1, 1986, Local 527, by means of a by-law, required that any member working on maintenance in a power plant, industrial, commercial or institutional building, other than through the Local's hiring hall, will be assessed \$24.00 per month. Shortly after the by-law became effective, Craddock sent a cheque for \$24.00 to Local 527. This cheque was returned to him with the explanation that the Executive Board did not approve of him working for Hydro as a TMM.

13. In support of the complaint, Craddock testified that there are members of Local 527

performing the same kind of work that the complainants were fined for performing, at the Pickering Nuclear Generating Station. Charges have not been filed against these members although the Toronto local was advised of this situation. Craddock conceded that the work at Pickering was outside of Local 527's geographical jurisdiction. In addition, as of September 1987, there were two Local 527 members performing work for Hydro at the Bruce Nuclear Generating Station as TMM's who have not been charged. Porter testified that he was aware of this situation and that charges will soon be filed against these members.

14. As indicated in paragraph 2 of this decision, the complainants attempted to prove that the respondent's actions contravened a number of provisions of the *Labour Relations Act*. As their general theme, Craddock emphasized that the work the complainants were performing was maintenance work under the CUPE collective agreement and not work under U. A.'s jurisdiction. Craddock argued that the respondent contravened section 3 of the Act since its conduct was motivated by a desire to prevent the complainants from continuing to work as CUPE members. CUPE, at the time, was the union of their choice. The complainants alleged that the respondent contravened section 62(2) of the Act since CUPE was the sole successor of the work, that the work the complainants performed had always belonged to CUPE, and that the U. A. could not carve out the work for itself. The complainants relied on section 68 of the Act in support of a general argument that they were being treated unfairly. Specific reference was made to the November 1986 by-law which they argued was not adhered to and to the composition of the Trial Board. The complainants submitted that the respondent contravened section 69 of the Act by offering them jobs at Darlington ahead of the members who had been paying travel card dues who were denied the opportunity to go to Darlington. Craddock argued that the respondent contravened section 70 of the Act since it sought by intimidation and coercion (the charges and fines) to compel the complainants to cease being members of CUPE and to refrain from exercising their rights under the Act. The complainants base their alleged contraventions of sections 71, 74 and 78 of the Act on the fact that the respondent required them to leave work on a number of occasions, thereby causing an unlawful strike. Finally, Craddock argued that the respondent contravened section 135(2a) of the Act when, in effect, it attempted to have the work of CUPE brought under its jurisdiction.

15. The provisions relied upon by the complainants are set out below:

3. Every person is free to join a trade union of his own choice and to participate in its lawful activities.

62.-(1) Where a trade union claims that by reason of a merger or amalgamation or a transfer of jurisdiction it is the successor of a trade union that at the time of the merger, amalgamation or transfer of jurisdiction was the bargaining agent of a unit of employees of an employer and any question arises in respect of its rights to act as the successor, the Board, in any proceeding before it or on the application of any person or trade union concerned, may declare that the successor has or has not, as the case may be, acquired the rights, privileges and duties under this Act of its predecessor, or the Board may dismiss the application.

(2) Before issuing a declaration under subsection (1), the Board may make such inquiry, require the production of such evidence or hold such representation votes as it considers appropriate.

68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

69. Where, pursuant to a collective agreement, a trade union is engaged in the selection, referral, assignment, designation or scheduling of persons to employment, it shall not act in a manner that is arbitrary, discriminatory or in bad faith.

70. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

71. Nothing in this Act authorizes any person to attempt at the place at which an employee works to persuade him during his working hours to become or refrain from becoming or continuing to be a member of a trade union.

74. No trade union or council of trade unions shall call or authorize or threaten to call or authorize an unlawful strike and no officer, official or agent of a trade union or council of trade unions shall counsel, procure, support or encourage an unlawful strike or threaten an unlawful strike.

78. No trade union shall suspend, expel or penalize in any way a member because he has refused to engage in or to continue to engage in a strike that is unlawful under this Act.

135-(2a) Where, on the complaint of an interested person, trade union, council of trade unions, employers' organization, employee bargaining agency or employer bargaining agency, the Board is satisfied that a person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency, bargained for, attempted to bargain for, or concluded any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection 146(1), it may direct what action, if any, a person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations, or employer bargaining agency, shall do or refrain from doing with respect to the bargaining for, the attempting to bargain for, or the concluding of a collective agreement or other arrangement other than a provincial agreement as contemplated by subsection 146(1).

16. The circumstances of this case are such that it is very difficult to see how sections 62(2), 71, 74, 78 and 135(2a) have any application. Section 62 is concerned with successor rights of trade unions by reason of a merger, amalgamation or transfer of jurisdiction. The fact that the respondent may have attempted to obtain work for its members which is performed by members of another trade union, as suggested by the complainants, does not give rise to the invocation of section 62. Section 71 is a provision which cannot be violated since the section simply indicates that nothing in the Act authorizes certain conduct specified therein. Since the complainants left work on a number of occasions with Hydro's permission in order to attend to union matters, those provisions dealing with unlawful strikes, section 74 and 78, are of no assistance to the complainants. They did not engage in an unlawful strike and the respondent did not attempt to have them engage in any such unlawful activity. Section 135(2a) gives the Board authority to remedy a situation where an entity which can only be bound by a provincial agreement as contemplated under subsection 146(1) bargained for, attempted to bargain for or concluded a collective agreement or other arrangement affecting employees other than a provincial agreement. The facts disclose no contravention of this provision by the respondent.

17. From the clear wording of section 68 of the Act, one must conclude that the respondent has not contravened that provision with respect to these complainants. Section 68 places a duty on a trade union to act in a certain way with respect to "employees in a bargaining unit" that it is entitled to represent. Since the complainants are not employees in a bargaining unit represented by the respondent, they do not fall within the scope of section 68. See, *Arthur Joseph Roberts*, [1974] OLRB Rep. Mar. 169; *Ontario Hydro*, [1980] OLRB Rep. July 1039; and, *Frank Manoni*, [1981] OLRB Rep. Dec. 1775.

18. In *Deborah Brown*, [1976] OLRB Rep. Feb. 4, and consistently since then, the Board has held that section 3 of the Act is a declaration of rights and by itself does not create an offence

under the Act. Although he did not specifically link the two in his argument, Craddock relied on both section 3 and section 70 of the Act when arguing that the respondent's conduct was based on a desire to prevent the complainants from continuing to be CUPE members. In reviewing the respondent's conduct as a whole, we are satisfied that its conduct did not breach sections 3 and 70 of the Act. The respondent's actions which had an impact on the complainants were not motivated by a desire to interfere with the complainants' rights to select the bargaining agent of their choice. The respondent's conduct was based on a concern relating to the work the complainants were performing for Hydro outside of the hiring hall system. The respondent's decision not to permit them to continue to perform the Hydro work only incidentally impacts on the complainants' rights to select the union of their choice. The respondent did not attempt to interfere with CUPE's representation of the complainants or to prevent them from becoming CUPE members. The complainants are members of the respondent and, as such, have obligations as members of U. A. If the respondent takes legitimate steps to ensure that its members adhere to its objectives, its conduct would not run counter to sections 3 and 70 even if it results in some members ceasing to work in a particular bargaining unit in which they were represented by another trade union.

19. When arguing that the respondent contravened section 69, Craddock made specific reference only to the fact that the respondent was prepared to send the complainants to Darlington ahead of those members who paid travel card dues and who would normally be given the first opportunity to obtain work outside of their local's jurisdiction. There are a number of difficulties with this position. The vast majority of the complainants elected not to go to Darlington. Moreover, there is no evidence before the Board that there were any members paying travel card dues at the relevant time, or that the practice of the union was to give those members preference on all occasions no matter what the circumstances. In our view, it is not necessary to decide whether the complainants are in a position to complain in the circumstances of this case with respect to alleged contraventions of the Act which did not affect them but affected other members.

20. Having reviewed all of the evidence, we are not satisfied that the respondent has contravened section 69 of the Act. In arriving at this conclusion, we recognize that the respondent cannot defend against the section 69 allegation by simply demonstrating that the complainants are not members in good standing and that members in such a position are not entitled to be on the out-of-work list. As a general rule, the Board does not police internal union affairs. However, the very substance of section 69 requires the Board to review the internal decision-making processes of trade unions which have an impact on their referral systems in order to decide whether referrals are being made in a way that is arbitrary, discriminatory or in bad faith. The Board explained its role in *Ontario Hydro*, *supra*, at paragraph 15, as follows:

15. In the case at hand the Board is not dealing with a question of improper referral, including failure to refer, to employment from the Local 506 hiring hall, rather it is dealing with the removal of the complainant's eligibility to be on the out-of-work list. The removal of his eligibility has resulted from internal procedures under the respondents' constitution. While this Board has no specific authority under the Act to undertake any sort of watch-dog role over a union's internal processes under its constitution and by-laws, the Act clearly gives it authority to determine whether a union had breached its section 60a [now section 69] duty. This in turn may require the Board to examine the union's conduct under its constitution and by-laws. While the Board is reluctant to invade the internal procedures of a trade union, it does do when it becomes essential to the exercise of the Board's authority and responsibility under the Act. See for example, the Board's decision in *George Zebrowski*, [1977] OLRB Rep. Mar. 143, in which the Board reviewed the procedures followed by the trade union under its "Constitution and Laws" in expelling the complainant from membership in the union, as a consequence of which the complainant was discharged from his employment. Another example of the Board finding it necessary to review a trade union's internal procedures is found in the Board's decision in *Rupert S. Martin*, [1977] OLRB Rep. Oct. 671. The Board in that case, in order to determine whether section 60a [now section 69] of the Act had been breached, reviewed the internal deci-

sion-making process by which the respondent trade union decided not to refer the complainant to any employers who were seeking to employ members of the respondent through its hiring hall. In that same decision the Board had dealt with a question of whether one officer of the trade union had authority to make the decision not to refer the complainant to employment. In dealing with that issue, the Board acknowledged that it "... does not have the authority to police union constitutions and by-laws." and then stated:

"This is not to say, however, that where a union's constitution or by-laws have been deliberately flouted or where certain steps have been taken notwithstanding a challenge that they might be in violation of the constitution or by-laws, that those actions might not be a relevant factor in determining whether or not a breach of section 60a [now section 69] has occurred."

In a like manner, the Board finds it essential in the circumstances of the instant case to review how the complainant was dealt with by Local 506 under its constitution and by-laws in order to determine whether there has been a breach of section 60a [now section 69] of the Act.

21. As we read the evidence, the respondent granted the complainants permission to work at Hydro but advised them when it did so that its permission could be revoked at any time. Porter testified that the respondent decided to revoke its permission since it formed the view that allowing its members to perform the type of work the complainants performed for Hydro would jeopardize the interests of subcontractors who have bargaining relationships with the respondent, and accordingly, harm the interests of its members. We are satisfied that this is the only reason why the respondent decided to direct the complainants to quit their Hydro jobs and that such a reason is based on a legitimate trade union interest. It was this legitimate trade union goal which motivated the respondent throughout its dealings with the complainants, up to and including denying placing their names on the out-of-work list. We express no view as to whether the union's decision was a wise one or one which would achieve the goals the union sought. It is not the Board's function to express such an opinion, much less to substitute its own judgement in this regard for that of the respondent's officials. The Board's sole function under section 69 is to determine whether the union has acted in a manner that is arbitrary, discriminatory or in bad faith.

22. The fact that the complainants initially sought the respondent's permission to take the Hydro jobs suggests that they themselves considered the union had a legitimate interest in the matter and could deny them permission. When granted permission, the complainants were advised that the respondent's permission could be withdrawn. The respondent offered the complainants alternative work, which most of them refused. The respondent advised the complainants that charges under the constitution might be filed against them if they refused to abide by the direction to leave the Hydro jobs. The evidence reveals that the trial was held in accordance with the provisions of the union's constitution. The complainants exercised their right to appeal under the constitution, unsuccessfully. The decision of most of the complainants not to pay the fines was made with the knowledge of the consequences. There is no evidence before us, nor was it argued, that the amount of the fines levied on the complainants was out of line with fines imposed on members by the respondent for similar constitutional violations.

23. The fact that certain members have not been charged is of no assistance to the complainants. Since the evidence suggests that decisions regarding work in a particular area are made by the U. A. Local having jurisdiction in that area, the rules governing the work of U. A. members at Pickering are determined by the Toronto Local, not Local 527. We accept Porter's evidence that those Local 527 members who recently started working at the Bruce Nuclear Generating Station for Hydro as TMM's will be charged under the constitution. The Board is satisfied that the failure to charge these members prior to the hearing in this matter is not evidence of discriminatory conduct by the respondent against the complainants.

24. For the foregoing reasons, this complaint is dismissed.

0560-85-R International Union Operating Engineers, Local 793, Applicant v. MIHU Holdings Limited and Mancheneel Investments Limited c.o.b. as **H & D Construction**, Respondent v. Labourers' International Union of North America, Local 183, Intervener

Bargaining Unit - Certification - Construction Industry - Whether any of the respondent's employees employed in the unit on the application date - Respondent's argument that the work of operating the hoists on the project was not the work of the applicant's craft and therefore the performance of it would not have brought any of the respondent's employees within the scope of the unit, rejected - Person hired in violation of the intervener's agreement with the MTABA can be considered an employee of the respondent in a unit other than the one covered by that agreement - Certificates issuing

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *M. Eayrs* and *N. Wilson*.

DECISION OF THE BOARD; December 10, 1987

1. The title of this proceeding is amended to describe the respondent as "MIHU Holdings Limited and Mancheneel Investments Limited c.o.b. as H & D Construction."

2. This is an application for certification in the construction industry within the meaning of section 119 of the *Labour Relations Act* ("the Act") and is made pursuant to section 144(1) of the Act. The applicant is a trade union within the meaning of clause 1(1)(p) of the Act and is an affiliated bargaining agent of a designated employee bargaining agency which, pursuant to the designation issued by the Minister under subsection 139(1) of the Act on July 13, 1978, is the International Union of Operating Engineers and Local 793 of the International Union of Operating Engineers.

3. The applicant seeks certification for a bargaining unit consisting of all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same in the Province of Ontario in the industrial, commercial and institutional sector of the construction industry and in Board Area 8 in all other sectors, save and except non-working foremen and those above the rank of non-working foreman. Persons who are employed "in the operation of cranes, shovels, bulldozers and similar equipment" are hereafter described as "operating engineers".

4. The sole issue remaining in dispute is whether any of the respondent's employees were employed in the subject bargaining unit on the application date. The nature of a question of this sort and the Board's prior approach to it were described in *E & E Seegmiller Limited*, [1987] OLRB Rep. Jan. 41, at paragraph 12:

12. In applications for certification in the construction industry, a person must be at work for the respondent employer on the date that the application is made in order to be included in the bargaining unit for the purposes of "the count" (see for example *Smiths Construction Company Arnprior Limited*, [1984] OLRB Rep. 521 among others). In addition to actually being at work, the employee must have spent a majority of his time on the date of application doing bargaining unit work (see for example *O. J. Jaffrey Limited*, [1964] OLRB Monthly Rep. Aug. 233;

Clairson Construction Company Limited, [1968] OLRB Monthly Rep. April 126; *George & Asmussen Limited*, [1971] OLRB Rep. Oct 683 among others). Where an employee was doing the work of one trade or craft on the date of application but prior thereto had been engaged in doing the work of several trades or crafts at the same wage rates, the Board has long been willing to examine a period of time prior to the date of application that is representative for purposes of ascertaining what work the employee spends the majority of his/her time doing and so determine whether or not that employee should be included in the bargaining unit. The length of this "representative period" has heretofore varied on a case by case basis (see for example *Heath Construction Inc.*, [1977] OLRB Rep. Oct. 691; *J. M. Chartrand Realty Ltd.*, [1978] OLRB Rep. May 423; *DeMarco Plumbing & Heating Company Limited*, [1985] OLRB Rep. May 659; *Des-Build Development Limited*, [1983] OLRB Rep. Nov. 1793 among others). It has also been suggested that the Board may look to the primary reason for which the employee was hired in order to determine his/her classification (*Pre-Con Murray*, [1965] OLRB Monthly Rep. Jan. 1003) but this test has largely been used in the circumstances where the evidence of what the employee actually did does not answer the question of whether the employee should be included in the bargaining unit (see for example *Des-Build Developments Limited*, *supra* and *Dufresne Piling Co. (1967) Ltd.*, [1984] OLRB Rep. July 924). In summary, the Board has looked at the following criteria in making its determinations:

- (a) whether the person concerned was employed by the respondent and at work on the date of application; and
- (b) if so, the work that that person spent the majority of his/her time doing on the date of application; or
- (c) where, previous to the date of application, the person has been engaged in the work of more than one trade or craft and the work s/he performed on the application date does not accurately reflect the work s/he normally spends the majority of his/her time doing, the work done by that employee during the appropriate representative period prior to the date of application; or
- (d) where there is inconclusive evidence with respect to the work in which an employee has been engaged, any other relevant factor, including the primary reason for hire.

The Board went on at paragraph 23 of that decision to make these observations:

23. However, it appears to us that recourse to a "representative period" has made the certification process in the construction industry less consistent, certain, and expeditious than it might be. The use of any such period is inconsistent with the requirement that a person be both employed by the respondent and at work on the date of application. The very nature of a "representative period" is such that its length will vary according to the circumstances of the particular application and creates uncertainty. Looking to a "representative period" overlooks the fact that once a trade union has been certified as bargaining agent for a bargaining unit of employees of an employer in the construction industry, any collective agreement to which that employer becomes bound, whether a provincial agreement or not, will apply to persons doing the work covered by that agreement. Consequently, whether or not an employee is covered by a particular collective agreement and represented by a particular bargaining agent depends on the work that s/he is doing at the time and is in no way dependent upon the work that s/he performed during any previous period. Further, the use of a "representative period" had tended to result in protracted and expensive proceedings before the Board. Because it is important that the Board's policies and tests be consistent and create as certain, equitable, and expeditious a means as possible for ascertaining which persons are in a bargaining unit, and having regard to the nature of applications for certification in the construction industry, we take the view that the Board should eliminate its use of a "representative period" and restrict itself to the following criteria:

- (a) whether the person was employed by the respondent and at work on the date of application; and

- (b) if so, the work that that person spent the majority of his/her time doing on the date of application or
- (c) where there is no conclusive evidence with respect to the work that the employee performed on the date of application, any other relevant factor, including the primary reason for hire.

(See also *Gilvesey Enterprises Inc.*, [1987] OLRB Rep. Feb. 220.)

5. This application was filed on June 5, 1985. Prior to the hearing set for July 19, 1985, the parties agreed that the hearing should be adjourned and that one of the Board's labour relations officers should be authorized to inquire into and report to the Board on the nature of the work being performed by the persons whom the applicant seeks to represent and who are classified by the respondent as construction labourers. At an initial meeting with the officer, the parties agreed to adjourn proceedings *sine die*. Several months later, the applicant asked that the examinations proceed. Further adjournments were agreed to during the examination process. The examinations were completed in June 1986. Preparation of transcripts of the examinations was completed and the officer's report thereon was served on the parties by November 1986. A hearing to consider the parties' submissions as to the conclusions which we should draw from the report could not be scheduled to suit the convenience of counsel before June 1987.

6. The report includes the testimony of six witnesses: Giacomo Guarascio, Renaldo Pannozzo, Gerald Houston, Peter Dimitruk, Manuel Perdigao and Jim McDyre. Messrs. Guarascio and Pannozzo are members of the applicant whom it says were employed as operating engineers on the application date because they were operating worker and material hoists at two of three buildings then being constructed by the respondent at 250, 260 and 270 Queens Quay West in the City of Toronto. Mr. Houston is another of the respondent's employees who operated such hoists at the subject construction site from time to time. Messrs. McDyre and Perdigao were the respondent's project manager and labour foreman, respectively, on this project. Mr. Dimitruk, a business agent for the applicant, dealt with Mr. McDyre concerning the employment of Messrs. Guarascio and Pannozzo and visited the site twice on the day this application was filed.

7. The first worker and material hoist on this project went into operation on April 19, 1985. Mr. McDyre thought he had to have an operating engineer to operate a hoist of this sort. He hired Mr. Guarascio on April 22, 1985 because Mr. Guarascio was an operating engineer. He intended Mr. Guarascio to be the person primarily responsible for operating that first hoist. He also expected that when the hoist was not in use, Mr. Guarascio would do labouring work within earshot of the intercom system used by others to call for the hoist. Prior to the erecting of the second such hoist, Mr. McDyre again sought an operating engineer to be the person primarily responsible for operating that second hoist. He hired Mr. Pannozzo for that reason on May 22, 1985, even though the second hoist was not yet in place. Mr. Pannozzo was to (and did) do labouring work until the hoist was ready; thereafter, as with Mr. Guarascio, Mr. McDyre intended that Mr. Pannozzo would operate that hoist and do nearby labouring work when it was not in use. The parties agreed during the officer's examination that this hoist "was erected and ready for operation on June 5, 1985"; before us they argued about whether this meant it had been in operation all day on June 5th or only part of the day.

8. The respondent paid Messrs. Guarascio and Pannozzo at the rates set out in the prevailing collective agreement covering employment of operating engineers on projects of this sort, and remitted benefit payments to the applicant on their behalf. By contrast, the respondent paid Mr. Houston at the rate prescribed by the intervener's then current agreement with the Metropolitan Toronto Apartment Builders Association.

9. One of the respondent's arguments was that the work of operating the hoists used on this project was not the work of the applicant's craft and, so, the performance of it would not have brought any of the respondent's employees within the scope of the bargaining unit applied for. This argument is based on the assertion (which was the subject neither of rigorous proof nor of challenge) that in 1982 provincial law ceased to require that operators of hoists of this sort hold a certificate of qualification as a hoisting engineer.

10. Counsel for the respondent cited *Joseph Brant Memorial Hospital*, [1981] OLRB Rep. Nov. 1598, and *Boise Cascade Canada Ltd.*, [1983] OLRB Rep. Feb. 194, for the proposition that "while the Labour Relations Act does accord a special status to craft unions, it does not guarantee their continued preservation when the craft basis for them has been eroded or disappears" (*Boise Cascade Canada Ltd.*, *supra*, at paragraph 20). Counsel for the applicant noted that in *Robertson-Irwin Limited*, [1969] OLRB Rep. Dec. 1097, and *Durie Mosaic & Marble Ltd.*, [1970] OLRB Rep. Apr. 153, the Board held that "the words 'similar equipment' [in the standard description of the applicant's craft unit] includes [sic] hoists." Neither decision qualified "hoists" by reference to legal requirements as to the qualifications of the operator. Counsel for the applicant also referred to the decision in *Ellis-Don Limited*, [1983] OLRB Rep. Jan. 65, because of this statement in the Board's description of the background to the grievance dealt with in that arbitration proceeding:

Up until the end of March of 1982, a manually operated construction hoist was used on the project to lift men and material to the various floors. *Consistent with the collective agreement, a member of Local 793 was employed to operate the hoist.* ... This grievance arises, however, because a member of Local 793 was not further employed to operate the elevator that took over the job of lifting workmen and construction materials when, during the normal progression of the project, the construction hoist was dismantled and taken out of service.

The Board concluded in that case that the relevant collective agreement did require that an operating engineer "operate" what would ultimately be the building's passenger elevator, when it was being used to move construction workers and materials.

11. Counsel for the respondent argued that none of the cases cited by counsel for the applicant addressed the precise issue he had raised. That is so. The two cases he cited did not address that issue either. Both involved jurisdictional disputes outside the construction industry, between a craft union and an industrial union. This is a certification application, not a jurisdictional dispute. The Board has been careful not to allow jurisdictional disputes to insinuate themselves into certification applications: *George and Asmussen Limited*, [1970] OLRB Rep. Oct. 783; *Semple-Gooder Roofing Ltd.*, [1983] OLRB Rep. Nov. 1908. It may be, as counsel for the respondent argues, that the rationale for that approach is weaker when the craft bargaining unit is defined by express reference to the work performed by the employees in it. Even so, the question in this application is still whether an individual can, in the particular circumstances, be said to fall within the bargaining unit applied for when performing the work in issue; it is not whether the assignment of that work to members of the applicant would be reversed by the resolution of a jurisdictional complaint arising out of competing claims for that work. There is not sufficient material before us to support a conclusion that "equipment" is "similar" in the definition of the applicant's traditional construction industry craft unit only if and so long as provincial law requires that a person operating the equipment hold a hoisting engineer's "ticket". Even if this were a jurisdictional dispute, it strikes us that there would be quite a lot more to consider in this instance than whether or not the law has ceased to impose such a requirement. This application will be dealt with on the basis that the hoists in question here are "similar equipment."

12. That brings us to the question whether any of the employees in question was employed

as a operating engineer for a majority of his time at the relevant time. The witnesses' testimony addressed what Messrs. Guarascio, Pannozzo and Houston had been doing before as well as on the application date; indeed, it addressed what they did afterwards as well. Not surprisingly, that testimony was neither precise nor consistent when elicited between 8 and 12 months after the event. Counsel for the respondent and intervener argued that we should consider the representative period in this case, despite what the Board said in the *Seegmiller* and *Gilvesey* decisions, because the examinations were conducted before those decisions issued. Counsel for the respondent suggested that those questioning the witnesses would have paid more attention to the date of the application and the circumstances of hiring had the examination taken place after those decisions issued.

13. We do not think that the evidence about what the subject employees did before the application date affects the conclusions we would draw if we confined ourselves to the criteria recommended in the *Seegmiller* and *Gilvesey* decisions. The mix of tasks performed by Mr. Guarascio does not appear to have varied significantly during the period addressed in the examinations. There is no evidence that Mr. Houston performed any significant amount of operating engineer's work on the application date, and he spent considerably less than a majority of his time on such work in the period between the hiring of Mr. Guarascio and the application date. The mix of tasks performed by Mr. Pannozzo on the application date was different from what it had been prior to that date, but that is because the hoist he was hired to operate was not up and running before that date. Having regard to the purpose for which Mr. Pannozzo was hired, we do not see how any period prior to the date on which that hoist was operational could be described as "representative" for the purpose of determining the nature of his employment on the application date.

14. Evidence and argument identified three major types of activity in which Messrs. Guarascio and Pannozzo may have engaged to varying degrees on the application date:

- a) activities associated with the movement of the cage: opening and closing the door of the cage and standing in it pushing the buttons which control its movement up and down;
- b) participation in the actual loading and unloading of the cage; and,
- c) general labouring work not directly associated with the hoist in any way.

15. Time spent in activities of the first sort clearly counts as time in the bargaining unit; time spent in activities of the third sort clearly would not. Activities of the first sort cannot take place while materials are being loaded into or unloaded from the cage. There were also times when a hoist was not in use; that is, it was neither being moved nor loaded nor unloaded. Actual performance of activities of the first sort could not alone have occupied a majority of either man's time at work. It seems from the witnesses' testimony that on this project loading and unloading of a hoist generally took up about the same amount of time as activities associated with movement of the hoist, and that for each hoist there would also have been time during which neither sort of activity was taking place. A worker who did only work of the first sort would be idle for the better part of the average day on this project.

16. Mr. Guarascio did not admit to participating in the loading and unloading of the cage or to doing labouring work not associated with his hoist. The respondent and intervener concede that if that were true on the application date - that is, if he did nothing (except possibly perform minor service on the hoist) during loading and unloading and while the hoist was not in use - he would fall within the bargaining unit. They invite us to find that he must have participated in activities of the other sorts. Mr. Pannozzo admitted that, during the course of his employment, he participated in

the loading and unloading of the cage and performed labouring work not associated with his hoist when it was not in use.

17. In the case of Mr. Pannozzo, at least, it is necessary to decide whether a hoist operator who participates actively in the loading and unloading of the cage falls outside the operators' bargaining unit when he does so. He falls within the unit when opening and closing the cage door and when pushing the buttons to make the cage go up and down. He cannot do those things during the loading and unloading of the cage. If he stands idle during that time, then he remains in the unit. Why should the character of his employment during that time change if he does some useful work connected in some way to the use of the hoist? Whatever might be the outcome of a jurisdictional dispute over the work of loading and unloading the hoist, we do not consider that the hoist operator ceases to be a hoist operator if he participates in that work. On that view, the evidence leads us to the conclusion that Messrs. Guarascio and Pannozzo both spent a majority of their work time in the bargaining unit on the application date.

18. The respondent argued that Mr. Pannozzo could not be counted as an employee because he had originally been hired as a labourer in violation of the intervener's collective agreement with the Metropolitan Toronto Apartment Builders' Association ("the MTABA"), by which the respondent would be retrospectively bound if we were to grant the request it has made in this application for a declaration under subsection 1(4) of the Act that the respondent and Iron Developments Inc. constitute a single employer for the purposes of the Act. The parties agreed that we need not entertain the application under subsection 1(4) unless we accept this argument on the assumption that the respondent is bound by the MTABA agreement.

19. The respondent's argument is based on the decision in *April Waterproofing Limited*, [1980] OLRB Rep. Nov. 1577, and others that follow it. Those decisions hold that persons hired in violation of the provisions of a collective agreement will not be regarded as employees *in the bargaining unit covered by that collective agreement* for the purpose of an application to displace or terminate the bargaining rights of the trade union party to that agreement. They do not hold that a person so hired cannot thereafter be considered an employee for any purpose in any other bargaining unit. The parties to this application agree that the unit applied for and the unit described in the MTABA agreement are mutually exclusive. Nothing in the decisions cited supports a conclusion that a person hired by the respondent in violation of the intervener's agreement with the MTABA could not later be considered an employee of the respondent in a unit other than the one covered by that agreement.

20. We conclude that Messrs. Guarascio and Pannozzo were the employees of the respondent who were employed in the subject unit on the application date. Both were members of the applicant on June 17, 1985, the terminal date fixed for this application and the date which we determine, under clause 103(2)(j) of the Act, to be the time for ascertaining membership under subsection 7(1) of the Act.

21. Section 144(2) of the Act provides for the issuance of more than one certificate if the applicant has the requisite membership support:

..., the Board shall certify the trade unions as the bargaining agent of the employees in *the bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

[emphasis added]

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated

bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 2 above in respect of all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.

22. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.

2326-84-U Joseph E. Habib, Complainant v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., Local 1973 and General Motors of Canada Limited, Respondents

Duty of Fair Representation - Practice and Procedure - Unfair Labour Practice - Employer asking that it be named as an intervener rather than as a respondent - Board finding it desirable that employer be named as a respondent in a duty of fair representation complaint - No breach of duty by union in refusing to take complainant's discharge grievance to arbitration

BEFORE: *Owen V. Gray*, Vice-Chair.

APPEARANCES: *James K. Ball, Paul Layfield and Craig Allen* for the complainant; *Pat Clancey and Rick Chene* for the respondent trade union; *Jason Hanson and Elizabeth Campin* for the respondent employer.

DECISION OF THE BOARD; December 21, 1987

1. Until February 16, 1984, Joseph Habib was an employee of General Motors Canada Limited ("GM") at its Windsor Transmission Plant, in a bargaining unit then represented by the respondent trade union. That day he was summoned to a meeting at which a management representative told him that he had been seen in locker areas where he did not have a locker, that money had been taken from lockers in those areas at around the times he was seen there, that he was seen going into an employee's locker, and that he was accused of theft of the money from the lockers. Mr. Habib denied the accusation. He was told he would be fired if he did not quit; if he quit, he would have a clean record and qualify earlier for unemployment insurance benefits. He quit. Some days later he asked the union to file a grievance with respect to his termination. It did. The grievance was pursued through the grievance procedure, but GM refused to reinstate Mr. Habib. The union decided not to take the grievance to arbitration.

2. This proceeding concerns a complaint filed by Mr. Habib under section 89 of the *Labour Relations Act* ("the Act"), in which he alleges that the union's conduct violated section 68

of the Act and asks for “reinstatement, recovery of loss of wages and benefits, interest, entitlement to seniority, indemnity for legal costs and expenses and ancillary relief.” His complaint names both the union and GM as respondents.

Question Whether Employer Should Be Intervener Rather Than Respondent

3. At the beginning of the hearing, counsel for GM asked that it be named as an intervener rather than as a respondent, on the ground that as an employer it could not breach section 68 of the Act. He conceded that a remedial order in this proceeding could affect GM equally whether it was described as a respondent or as an intervener and that it would participate in the hearing in either event. I deferred consideration of this matter to the conclusion of the hearing.

4. Even though section 68 of the Act imposes no duty on an employer, an employer’s rights can be affected by the Board’s exercise of its remedial authority under subsection 89(4) if it finds that a trade union has breached its duty under that section in its representation of one of the employer’s employees: See *Ford Motor Co. of Canada.*, [1973] OLRB rep. Oct. 519; *Imperial Tobacco Products*, [1974] OLRB Rep. July 418, reconsideration denied at [1974] OLRB Rep. Sept. 609; and *Town of Oakville*, [1984] OLRB Rep. Apr. 640. The Board may determine that an abandoned grievance should be taken to arbitration despite the expiry of collective agreement time limits, and in that event would normally direct that the employer not raise any objection to arbitrability on the basis of such time limits: See, for example, *Leonard Murphy*, [1977] OLRB Rep. Mar. 146; *Massey Ferguson Limited*, [1977] OLRB Rep. Apr. 216; *North York General Hospital*, [1982] OLRB Rep. Aug. 1190; and, *Savage Shoes Ltd.*, [1983] OLRB Rep. Dec. 2067. Exceptionally, the Board may grant a more direct remedy, by ordering that an employee be reinstated to employment or to a position on the seniority list or by determining itself a matter which might have been the subject of arbitration under the collective agreement: See, for example, *Toronto Hydro Electric System*, [1980] OLRB Rep. Oct. 1561; *Timothy W. Smith*, [1983] OLRB Rep. Dec. 1947; and, *Abitibi Price Inc.*, [1985] OLRB Rep. July 1099 and [1987] OLRB Rep. Jan. 72. When it grants any of these remedies, the Board directly affects the employer’s legal rights.

5. The rules of natural justice and the *Statutory Powers Procedure Act* require that any person whose legal rights may be directly affected by the results of a proceeding before a tribunal be given notice thereof and the opportunity of and right to participate in a hearing. They are silent, however, about how a tribunal should entitle its proceedings or describe the parties who appear before it. They do not require, for example, that the names of all those whose legal rights may be affected by the results of a proceeding be named in some way or other in the title of proceeding or style of cause adopted to identify the proceedings (nor, for that matter, that a title or style of cause be adopted at all.)

6. The custom of the Ontario Labour Relations Board has been to employ a court-like title of proceeding, sometimes called a “style of cause”, without requiring that every person whose legal rights may be affected by the result of the proceeding be named in that title. The person or persons who initiate the proceedings are described as “Applicant(s)” or “Complainant(s)”, depending on the nature of the proceedings. A person becomes a “Respondent” by being so named by the Applicant or Complainant in accordance with the latter’s understanding of the requirements of the forms of Complaint or Application prescribed by the Board’s Rules of Practice. Initially, the title of the proceeding names the Applicant(s) and/or Complainant(s) and the Respondent(s). A party not named as a “Respondent” who seeks to participate in the proceedings (if entitled by law or permitted by the Board to do so) becomes an “Intervener” or “Objector”, and the party’s name and label are added to the title of the proceeding.

7. The Board’s practice with respect to the naming of parties varies among the types of

proceeding with which the Board deals. In an application for certification, for example, the appropriate respondent is the employer of employees in the bargaining unit for which certification is sought; an incumbent trade union whose bargaining rights would be terminated by the granting of the application is not ordinarily named as a respondent, but may choose to be an intervener. In an application for termination of bargaining rights (sometimes referred to as "decertification"), the appropriate respondent is the incumbent trade union; the employer of the employees in the bargaining unit represented by the incumbent is not ordinarily named as a respondent, but may choose to be an intervener. (Employees in the unit for which certification or decertification is sought may intervene and participate as parties, but when they do they are ordinarily described as "Objectors" rather than "Interveners"; employees rarely intervene in such applications except to oppose them.) As these examples make clear, the distinction between a Respondent and an Intervener is only that a Respondent becomes so named in the title of the proceedings on someone else's initiative, while an Intervener becomes so named in the title only as a result of its own initiative.

8. In complaints alleging the violation by a trade union of section 68, the Board has long accepted the naming of the employer as a respondent when the remedies sought may directly affect the employer's rights: see *Imperial Tobacco Products*, *supra*. In *Steel Co. of Canada Ltd.*, [1975] OLRB Rep. Dec. 919, the Board stated that:

... since *Imperial Tobacco Products (Ontario) Ltd.* [1974] OLRB Mthly. Rep. 418 the Board, on its own initiative, has attempted to advise employers that they may be affected by a section 60 proceeding whenever the face of a complaint reveals such an interest. This notice must be considered in conjunction with Rule 54 which reads:

54. The Board may direct that any person be added as a party to a proceeding or be served with any document, as the Board considers advisable.

Where such a notice has been given a complainant should move at the commencement of a hearing that the employer be formally added as a party, although the Board may do this of its own motion.

9. It does not appear to me that naming the employer in the title of the proceedings is a legal prerequisite to the granting of a remedy which affects the employer's rights; it is enough that the employer be given notice that the proceedings may affect its rights. Nevertheless, it is not at all inappropriate for a section 68 complainant to name the employer as a respondent when he or she seeks a remedial order directed at the employer as well as the respondent trade union. Indeed, it is desirable that this be done, since the complainant's naming of the employer in the title of the proceedings helps bring it home to the employer that it is legally interested in and affected by the proceedings. The complainant having done that in this case, I can see no reason or need to relabel the employer as an Intervener.

The Complaint

10. The thefts and attempted theft of which Mr. Habib was accused by management on February 16th took place on February 13, 14 and 15, 1984, in certain locker areas in the plant. (There are several locker areas in the plant; Mr. Habib did not have a locker in any of them at the time.) By the time of the February 16th meeting, three of the victims had given statements identifying Joe Habib as someone who was in the vicinity around the time that money was taken from their lockers. Two other employees had given statements about seeing a person wandering about in the locker areas around the time and place of a theft. One of those identified that person as Joe Habib. None of these five witnesses (hereafter referred to collectively as "the secondary witnesses") claimed to have seen Mr. Habib enter or take anything from a locker.

11. Another employee, Peter Stock, claimed to have seen Mr. Habib walking slowly around his locker room on February 15th, looking up each aisle. Mr. Stock stated that he became suspicious and decided to keep an eye on his locker while he took his shower. He kept looking out while in the shower, and eventually saw Mr. Habib open his (Stock's) locker door and put his hand inside. Mr. Stock stated that he then "called out get out of there and he jumped and said something like I must be in the wrong locker and took off very fast."

12. Rick Chene was then the union committeeman responsible for Mr. Habib's area at the time of these events. He was in the union office on February 15th when an employee came in with his hair still wet from showering, complaining that his wallet had been taken from his locker while he was in the shower. Mr. Chene did not participate in the resulting discussion, as the incident did not appear to concern his area. Five or ten minutes later, a call came in from Mr. Stock, who said he had seen someone going into his locker and recognized the person as someone who worked in the assembly room. Mr. Chene then took notice, because the assembly room was in his area. Mr. Chene went down to the assembly room. Another committeeman arrived there at the same time with Mr. Stock. Stock identified Mr. Habib for them as the person he had seen entering his locker.

13. Mr. Chene then took Mr. Habib into the union office. He told him of the accusation Mr. Stock had made and that other employees had complained of thefts and spoken of seeing someone with a football shirt like the one Mr. Habib was wearing. He told Mr. Habib that while he was not accusing him of anything, he thought he should know that others were. He said that he did not know whether a complaint had been made to the company, but noted that that could be a problem for Mr. Habib. He also noted that there was a lot of talk about thefts, and rumours that "guys would take matters into their own hands." Mr. Habib initiated a discussion about the grievance procedure, then asked who was making the accusation and whether he could see him. Mr. Chene arranged to take Mr. Habib to see Mr. Stock. On meeting Habib, Stock said "That's him", to which Habib replied "I didn't do it." Stock got upset and said "you're also a liar." Messrs. Chene and Habib returned to the union office for further discussion, and then Mr. Habib returned to work.

14. In the complaint he filed, Mr. Habib alleged that Mr. Chene told him on February 15th that "the 'Union' would not provide any representation of the Complainant in the event that the employer elected to take disciplinary action or discharge the Complainant in respect of the alleged theft." I find that is not so. Mr. Chene told Mr. Habib that he (Chene) could personally represent him if something arose that day but not if it arose on the following day, February 16th, as he had requested and been given that day off. Mr. Chene had assisted Mr. Habib with grievances and other workplace problems previously, and I am satisfied he bore Mr. Habib no ill will, either generally or as a result of the allegations of theft which later led to his termination.

15. Mel Labutte, then the union's plant chairman, represented Mr. Habib at the meeting of February 16, 1984. In the complaint he filed, Mr. Habib said Mr. Labutte believed him to be the person responsible for the thefts and was therefore content to see him terminated. He alleged Mr. Labutte told him at the meeting that "the 'Union' would never win a grievance against the Complainant's discharge and the the Complainant ought to voluntarily quit his employment with the employer" and that "given the alleged positive identification by eyewitnesses, no meaningful purpose would be served in his grieving a discharge at the instance of the employer." He pleaded that Mr. Labutte said these things, and "permitted" the personnel manager to make certain statements in the meeting, all "with a view to seeing that the Complainant's employment with the employer was summarily terminated." In cross-examination, Mr. Habib admitted that Mr. Labutte did not tell him he should quit; he said got that message from Mr. Labutte in a "round-about way" from statements Labutte made to him privately about the union's lack of success in previous cases of this

sort. He also acknowledged that Mr. Labutte told him the union would file a grievance if he chose not to quit and was discharged.

16. Mr. Labutte had been present when, prior to the meeting, with Mr. Habib, each witness had been asked to identify the person he had seen out of several photographs and to write out his statement. When Mr. Labutte spoke to Mr. Habib privately during the course of the February 16th meeting, he thought the company had a strong case and was pessimistic about the possibility of reversing a discharge at arbitration. He did tell Mr. Habib that the union had not had much success in cases of this sort. I note that there is no evidence or suggestion that this statement was untrue. I am satisfied that Mr. Labutte gave Mr. Habib his honest appraisal of the situation to assist Mr. Habib in making his own decision about what to do. I am also satisfied that Mr. Labutte made it clear to Mr. Habib that it was up to him to decide whether to quit or be discharged and that, in the latter event, the union would file a grievance if Mr. Habib wished. There is no evidence that Mr. Labutte bore Mr. Habib any ill will, nor does the evidence support any inference that Mr. Labutte's conduct was in anyway motivated by a desire to have Mr. Habib's employment terminated.

17. Four or five days after his "quit", Mr. Habib spoke to Mr. Labutte about filing a grievance. Mr. Labutte's initial reaction was that Mr. Habib could not file a grievance because he had quit. Mr. Habib next spoke about this to Pat Clancey, then Sub-Regional Director of the UAW. Mr. Clancey then spoke to Mr. Labutte and advised him that a grievance should be filed if Mr. Habib wished, noting that it might be argued that the grievor quit under duress. Mr. Habib then met with Mr. Labutte to prepare and sign a grievance asking that his quit be reversed. That grievance was filed on or about February 27, 1984.

18. Pat Clancey became actively involved in Mr. Habib's grievance in mid March, after it had been denied at the third stage of the grievance procedure, because he would be representing the union and the grievor at the fourth step meeting. He reviewed the material the union had. This included copies of the handwritten statements of Mr. Stock and the secondary witnesses and a transcript of questions asked of and answers given by Mr. Habib at the meeting of February 16th. Mr. Clancey met with Mr. Habib and reviewed the contents of those documents with him. He discussed with Mr. Habib his assertion (recorded in the transcript of the February 16th meeting) that there were witnesses who would say he was elsewhere at the time Mr. Stock claimed to have seen him with his hands in his locker. He asked Mr. Habib to make those witnesses available and provide Mr. Labutte with their names, so that the employer could be advised of them (to minimize any adverse consequence of not having mentioned earlier them in the grievance procedure). He confirmed this in a letter to Mr. Habib dated March 28, 1984.

19. In a subsequent letter of May 28, 1984, Mr. Clancey advised Mr. Habib that it was his intention to take the matter to arbitration after the fourth step grievance meeting, "subject to the discussions that I have with your witnesses and discussions that I will have with the Company witnesses." He interviewed each of the company's witnesses. He focussed considerable attention on Peter Stock, whom he regarded as the key witness because without him, in Mr. Clancey's view, management did not have any case. Having questioned him closely, Mr. Clancey formed the impression that Mr. Stock would be a credible witness.

20. Mr. Clancey arranged a second meeting with Mr. Habib, to which Mr. Habib was to bring his two alibi witnesses. Only one witness materialized. That witness remembered seeing Mr. Habib where Habib claimed to have been, but he could not say what day he saw Habib there. Furthermore, the time of day at which he recalled seeing Mr. Habib was different from the time at which Mr. Stock claimed to have seen Mr. Habib in his locker, so this witness would not have pro-

vided a solid alibi even if he had recalled this encounter with Mr. Habib as having occurred on February 15th. Mr. Clancey told Mr. Habib that this witness was not helpful, and that he ought to arrange for him to meet the other witness to whom Mr. Habib had earlier referred. He raised this again with Mr. Habib several times thereafter, but this second witness never materialized.

21. Mr. Clancey went to the fourth step meeting in September 1984 and tried to get Mr. Habib reinstated. GM maintained the position it had taken all along: the union had no right to file a grievance on Mr. Habib's behalf because he was no longer an employee and, "should the voluntary quit ... not prevail, the Company's action would be to discharge the grievant for violation of Plant Rule 27." (The text of Plant Rule 27 is not before me; the apparent understanding of all of the parties before me is that it deals with theft and attempted theft.) Mr. Clancey felt he could win on the "quit" issue, and thought the real issue was whether the company could prove violation of Plant Rule 27. If it could, he reasoned, there would be no point in taking the grievance to arbitration because it would not succeed in those circumstances. I note that counsel for the complainant did not take issue with this part of Mr. Clancey's analysis. He, too, focused on the likelihood of success or failure on the question of actual or attempted theft.

22. In the complaint he filed, Mr. Habib said Mr. Clancey "advised the Complainant followed the denial of the grievance that no arbitration would be taken on behalf of the Complainant given that the Complainant had voluntarily terminated his employment with the employer." In cross-examination, Mr. Habib acknowledged that Mr. Clancey had not given that as the reason for his decision. He also alleged in his complaint that Mr. Clancey "was content to see the Complainant's grievance denied and recommended that no arbitration be taken in respect of the disallowance of the grievance by the employer upon the grounds that at all material times Pat Clancy [sic] believed that the Complainant was a thief as alleged based upon the allegations made against him in that regard."

23. As for his being "content" to see Mr. Habib discharged by reason of a personal belief in Mr. Habib's guilt, Mr. Clancey testified that he does not personally regard unadmitted theft or attempted theft as cause for discharge. He realized, however, that arbitrators generally think it is. To him, the relevant question was not whether he thought Mr. Habib was guilty but, rather, whether the arbitrator would come to that conclusion if the grievance went to arbitration. On that question, based on his extensive experience with labour arbitration generally and with the particular arbitrator by whom the matter would be heard, he had concluded that Mr. Habib did not have a good case without a witness to corroborate his claim that he was not at the plant when Mr. Stock claimed to have seen him in his locker. That is why he made his decision not to take Mr. Habib's grievance to arbitration. I found Mr. Clancey to be a forthright and entirely credible witness. I have no hesitation in accepting that the response he gave in his testimony were the real and only reasons for his decision. I am satisfied that Mr. Clancey would have taken Mr. Habib's grievance to arbitration if he thought he had a good case, whatever he may otherwise have thought about Mr. Habib's guilt or innocence.

24. Mr. Clancey told Mr. Habib of his decision and the reasons for it in mid-October 1984. This complaint was filed in November 1984. Thereafter, the parties agreed to postpone any hearing until after Mr. Habib pursued an internal union appeal of Mr. Clancey's decision. A hearing in connection with that appeal took place in May 1986. The subsequent appeal decision is not before me. It did not result in the union's pursuing Mr. Habib's grievance to arbitration. That decision is not the subject of these proceedings. The complaint alleges that Mr. Clancey's decision not to take the grievance to arbitration constituted a violation of the union's duty under section 68 of the Act. The trade union does not rely on the availability of the appeal process as a defence to that complaint.

25. Section 68 of the *Labour Relations Act* provides:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

As the Board observed in *Jeanne St. Pierre*, [1986] OLRB Rep. June 883:

19. Ordinarily, as in this case, the collective agreement by which employees are bound does not give them the right to decide whether their grievance will be pressed to arbitration - that is exclusively for the trade union to decide. The *Labour Relations Act* does not require that a trade union carry a grievance through to arbitration merely because the grievor wishes that this be done. In making its decision whether or not to proceed to arbitration, the trade union's obligation to the grievor is that it must not act in a manner which is arbitrary, discriminatory, or in bad faith. These terms were described in *Savage Shoes Ltd.*, [1983] OLRB Rep. Dec. 2067, 6 CLRBR (NS) 134:

36. Section 68 requires that each trade union decision be grounded on a consideration of relevant matters, free from the influence of irrelevant considerations. The requirement that a trade union not act in a manner which is in bad faith protects the legitimate expectation that an individual employee's bargaining agent will act honestly and free of any personal animosity toward him. The requirement that a trade union not act in a discriminatory manner protects against the making of distinctions between employees and groups of employees on bases which have no relevance to legitimate collective bargaining concerns. "Bad faith" and discriminatory", therefor, test for the presence, in the process or results of union decision-making, of factors which should not be present. "Arbitrary", on the other hand, describes the absence in decision-making of those things which should be present. A decision will be arbitrary if it is not the result of a process of reasoning applied to relevant considerations. The duty not to act arbitrarily requires a trade union to turn its mind to the matter at hand.

37. Although this duty is imposed on the trade union as an institution, the trade union observes or breaches the duty through the actions of its officials or decision-making bodies. Especially where an impugned decision is that of a single official, there are obvious difficulties in reviewing the process by which that decision was made. Only the union official knows what his thought processes were and what facts and circumstances he actually took into account in the course of arriving at this decision. His ability to recall and articulate what took place in his mind may be influenced, subconsciously or otherwise, by self-interest and by the knowledge that he is the only witness to these crucial mental events.

38. With these thinking process hidden from direct examination, a review of the behaviour of a trade union official must necessarily focus on what he did and the context in which he did it, as well as on what he says he thought. The result of the decision-making process is weighed against the facts and circumstances on which it is said to have operated. If the resulting interpretation of facts or of a collective agreement is found by the Board to be "reasonable" (*Clifford Renaud*, [1976] 2 Can. LRBR, [1976] OLRB Rep. Jan. 967, ¶22; *Jay Sussman*, [1976] 2 Can. LRBR, [1976] OLRB Rep. July 349 ¶11; *I.T.E. Industries Ltd.*, [1980] OLRB Rep. July 1001, ¶20), "not unreasonable" (*Ivan Pletikos* [1977] OLRB Rep. November 776, ¶3), "not to open to challenge" (*Oil Chemical & Atomic Workers Int'l Union and its Local 9-698*), [1972] OLRB May 521, ¶3), or at least "not implausible" (*CUPE Local 1000 - Ontario Hydro Employees Union*, [1975] May 444, ¶32), then the Board is inclined to find that the decision is not arbitrary. Where the decision maker, on the other hand, misapprehends facts and circumstances which the Board considers "patent" and arrives at an "almost perverse" understanding of the facts and circumstances, the Board will conclude that union effectively barred itself from "directing its mind to the real question", and that in so doing it has acted in an arbitrary fashion: *The Corporation of the County of Hastings*, [1976] OLRB Rep. November 1072, ¶22.

Where it is difficult to see a rational pathway between the facts and circumstances said to have been taken into account in making that decision: *CUPE Local 2327*, [1981] OLRB Rep. June 623, ¶30; *Alvin Plummer*, [1983] OLRB Rep. Nov. 1920, 5 CLRBR (NS) 108].

The Board has recognized that considerations relevant to a decision whether to press a grievance to arbitration include the merits of the grievance, the likelihood of its success, the financial commitment involved in proceeding to arbitration and the claims or interests of other individuals or groups within the bargaining unit who may be affected by the arbitration proceedings and their possible results: see, for example, *Catherine Syme*, [1983] OLRB Rep. May 775 at ¶20 ff.

26. In *Swing Stage Ltd.*, [1983] OLRB Rep. Nov. 1920, 5 CLRBR (NS) 107, the Board made these observations about the union's duty in a case in which a discharge grievance is abandoned:

40. Discharge is the ultimate sanction in collective bargaining. Through it an employee forfeits not only his livelihood but also valuable accrued rights including seniority and benefits, acquired sometimes over years of service. For this reason the law in some jurisdictions gives discharged employees an absolute right to have their terminations reviewed at arbitration. (See Division V.7 (Unjust Dismissal) Section 61.5 of the *Canada Labour Code*, R.S.C. 1970, C. L-1, amended S.C. 1977-78, C.27, applicable to employees not covered by a collective agreement). Some maintain that the duty of fair representation should be interpreted as requiring a union to carry the grievance of any discharged employee to arbitration (see Weiler, P. *Reconcilable Difference*, (1980) pp. 137 ff.). In *Brenda Haley* [1980] 3 Can. LRBR 501; (1980), 41 di 295, [1981] 2 Can. LRBR 121; 41 di 311 (Plenary Board Review), however, the Canada Labour Relations Board declined to adopt Professor Weiler's view.

41. This Board does not view the language of section 68 of the Act as guaranteeing to every employee the arbitration of his or her discharge....

...

46. In our view, however, the law has evolved beyond the point where the union may simply assert that it has "considered" an employee's request for help and "decided" not to help him.

47. The decision not to process a grievance for an employee who has been disciplined or discharged may, depending on the circumstances, be a justified and responsible exercise of a union's prerogatives. Where, however, an employee has been discharged there is an obligation on a union to provide a satisfactory explanation for its decision not to process a grievance. While the legal burden in a section 68 complaint is on the individual complainant, once it is established that a union member has suffered the ultimate sanction of discharge, this Board expects a persuasive account from the union to justify its refusal to file a grievance, or having done so, to carry the grievance to arbitration.

27. The major thrust of the concluding argument made by counsel for the complainant is that when he made his decision, Mr. Clancey failed to consider or investigate the possibility that Mr. Habib had been "framed". Counsel argues that Mr. Clancey should have been alerted to that possibility from a careful reading of the documentation he had at the time, including a photocopy of a handwritten document dated February 15, 1984, which reads

We the undersign [sic] seen Joe Habie [sic] in the Locker area in "H" bld [sic] about 10:00 - to 10:30 pm. Monday Feb. 13/84 also Tuesday Feb. 14/84 around 2:00 sitting down reading the news paper and walking around the locker area.

This document appears to be signed by four of the secondary witnesses referred to in paragraph 10 above. The name "P. Stock" is printed below those signatures. Below that the names of the four signatories and Stock have been written, together with their addresses and telephone numbers. The note "11 AM - Union office" is written in ink on the upper right hand corner of this photo-

copy. Mr. Clancey testified that he received the photocopy from Mr. Labutte. He does not remember the "union office" note being on it when he received it, and does not know when or by whom the note was added. He used the document as a source of information about how to contact the witnesses whose addresses appeared on it, and made notes of his own on it about their availability. He did not regard it as having any significance with respect to Mr. Habib's guilt or innocence.

28. Counsel for the complainant invites us to infer that the "union office" referred to in the added note is the union office in the plant, and that this document reflects an attempt by the witnesses to get the union to take steps against the complainant. This would make them "interested" in the discipline proceedings in which they gave individual witness statements, and that would cast doubt on the reliability of those statements. In any event, whether it was first directed to the union or the company, the document is said to show that the witnesses were acting in concert in "fingering" the complainant. At one point during the hearing, this "conspiracy" theory included the assertion that the witnesses had conspired with one another and with Mr. Chene to concoct their evidence with respect both to the thefts and to their positive identifications of Mr. Habib.

29. I note immediately that there is not the slightest evidence that Mr. Chene participated in concocting allegations against Mr. Habib or in any other wrongdoing of any kind. I do not draw any adverse inference from the union's not calling any other evidence to explain the "11 AM - Union office" note. This issue was first addressed by counsel for the complainant in cross-examination of Mr. Clancey, at which point Messrs. Labutte and Chene had already testified without being cross-examined on that document. The issue was the complainant's. If there might have been something to it, then he bears the consequence of its not having been more fully developed. I also note that the complainant has offered no evidence to support this conspiracy theory, other than what might be drawn from the material Mr. Clancey had before him at the time of his decision. Finally, it is important to note that neither Mr. Habib nor anyone on his behalf offered this conspiracy theory to Mr. Clancey at any time before he made his decision. The issue, then, is whether Mr. Clancey acted arbitrarily in failing to respond to the information he had at the time by discerning and investigating the possibility of a "frame-up", before making his decision whether or not to take the grievance to arbitration.

30. One can infer from the documents Mr. Clancey had at the time he made his investigations and decision that the alleged thefts and Mr. Habib's proximity to them was discussed among four of the secondary witnesses before they gave their individual statements. One can imagine that this might have led them to resolve uncertainties in their individual recollections in favour of consistency with the recollections of the others, but there is nothing in the documents which would have suggested that any of them had a motive to "frame" Mr. Habib.

31. I do not find anything arbitrary in Mr. Clancey's not having attached great significance to the pre-statement communications between the secondary witnesses. The focus of his concern, not unreasonably, was on the evidence of Mr. Stock. That evidence did not depend for its effect on the evidence of the secondary witnesses, and their evidence was not particularly damaging by itself. Nothing in the documents or in any of the information available to Mr. Clancey suggested that Mr. Stock had joined in any discussion about the complainant with any of the other witnesses before identifying him as the person who had entered his locker. Mr. Clancey would have had no reason to suppose that the statements of the secondary witnesses could form the basis of an attack on Mr. Stock's testimony at arbitration.

32. Counsel for the complainant also argued that Mr. Clancey had underestimated the onus of proof which the company would bear on the question whether Mr. Habib had engaged in theft or attempted theft. He submitted that the onus of proof of behaviour which is criminal in nature is

the same as the onus of proof in criminal proceedings, citing *Re Canadian General Electric Co., Ltd.* (1949), 1 L.A.C.. 320 (Laskin). While that decision is to that effect, the prevailing view of arbitrators today is that the employer need only prove its case on the balance of probabilities: see Brown and Beatty, *Canadian Labour Arbitration*, (2nd ed., Canada Law Book, 1984) at p. 347ff; and, Palmer, *Collective Agreement Arbitration in Canada*, (2nd ed., Butterworths, 1983) at p. 268ff. It is apparent to me that Mr. Clancey assessed this case against this prevailing view with respect to onus, and in that I can find nothing arbitrary.

33. Mr. Habib's guilt or innocence of the original charges against him is not in issue, and I express no opinion on that question. The issue in this proceeding is whether the respondent trade union violated its duty under section 68 of the Act. Assuming, without deciding, that the complainant was constructively discharged and that the respondent trade union must therefore give "a persuasive account ... to justify its refusal to ... carry [the complainant's] grievance to arbitration", the respondent has discharged that burden of persuasion. I do not find any arbitrary, discriminatory or bad faith conduct in the representation of Mr. Habib up to and including Mr. Clancey's decision that his grievance should not be taken to arbitration. In view of that conclusion, it is unnecessary to determine whether, as counsel for GM argued, the remedy had I found a violation of section 68 would have been limited to a declaration because there was no complaint that the union violated section 68 in the internal union appeal which followed the events in question.

34. This complaint is, accordingly, dismissed.

0507-85-R; 0508-85-R; 0509-85-R; 0510-85-R; 0841-85-R; and 0877-85-R
International Union of Operating Engineers, Local 793, Applicant v. Harnden & King Construction Ltd., Respondent v. Group of Employees, Objectors

Bargaining Unit - Certification - Applicant challenging the inclusion of three employees in the unit - Employees on the list of employees who were at work in the bargaining unit in another application on the application date - Employee can only be in one bargaining unit at the time the application is made - Board finding implicit agreement that employees in other unit since no one challenged their inclusion on that list

BEFORE: *Harry Freedman*, Vice-Chair, and Board Members *I. M. Stamp* and *H. Kobryn*.

APPEARANCES: *S. B. D. Wahl* and *J. Slaughter* for the applicant; *Bruce Binning* and *Grant Robinson* for the respondent; *Peter M. Whalen* for the objectors.

DECISION OF THE BOARD; December 29, 1987

1. These are a series of applications for certification by which the applicant seeks to obtain bargaining rights for various groups of employees employed by the respondent at different locations and in its various operations.

2. The respondent is a construction contractor primarily engaged in the construction of roads. It also owns and operates gravel pits, asphalt production facilities, storage yards and garage facilities.

3. There were challenges made in respect of the bargaining unit descriptions and lists of employees in these applications. Additionally, timely statements purporting to express opposition to the applications (hereafter referred to as petitions) were filed.

4. The Board authorized a Labour Relations Officer to meet with the parties and also conduct various examinations with respect to all of the outstanding issues, save for the voluntariness of the petitions. The reports of the Labour Relations Officer were filed and the parties were content to rely on written argument with respect to those reports. The Officer also reviewed the lists of employees and the degree of membership that the applicant had among the employees in the various bargaining units for which the applicant seeks certification.

5. The Board, pursuant to its decision of May 15, 1986, received the evidence and argument of the parties relating to the voluntariness of the petitions in respect of all of the applications in which those petitions were numerically relevant.

6. We have first disposed of all of the outstanding issues in relation to each application but for the effect of the petitions on the exercise of our discretion under section 7(2) of the Act. We have made a final decision in the one application in which the petitions were not numerically relevant to that application without considering the petitions. We have then dealt with the applications in which the petitions were numerically relevant and have considered their effect on the exercise of our discretion under section 7(2) of the Act.

7. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) and section 117(e) of the *Labour Relations Act*.

Board File No. 0507-85-R

8. The parties agreed to the description of the appropriate bargaining unit. Having regard to the agreement of the parties the Board finds that:

all employees of the respondent working at and out of the Dale Road pit and asphalt plant, in Hamilton Township, Northumberland County, save and except scale man, non-working foremen and those above the rank of non-working foreman

constitute a unit of employees of the respondent appropriate for collective bargaining.

9. The applicant challenged the list of employees filed by the respondent in respect of the above described bargaining unit. The applicant claimed that Greg Horsley, classified by the respondent as the Asphalt Plant Foreman, should be excluded from the bargaining unit because he exercises managerial functions and therefore is not an employee within the meaning of the Act by reason of section 1(3)(b) of the Act.

10. The applicant also claimed that three of the persons listed on Schedule "D" filed by the respondent in this application, Dave George, Jack Bailey and Eugene Hines ought to be excluded from the bargaining unit described above, and be included in the bargaining unit of employees for which the applicant seeks certification in Board File No. 0509-85-R.

11. Mr. Horsley's duties and responsibilities were described in the Labour Relations Officer's report in this matter. Generally, Mr. Horsley monitors and supervises the work of two employees who operate the asphalt plant. Mr. Horsley also performs a substantial amount of the physical work related to the asphalt plant's operation. Mr. Horsley reports to Andre Reynolds, a

member of the respondent's management, who decides upon the size of the crews at the asphalt plant and the filling of any vacancies that might occur there. While Mr. Horsley does have some responsibility for ensuring that the employees under his supervision perform their work properly, and in that vein, can warn them to "straighten up", he is not aware that he has the authority to impose any formal discipline upon any employee. If such occasion arises, Mr. Horsley consults with Mr. Reyns. Mr. Horsley is paid a higher hourly rate than the two employees under his supervision and also has the use of a company vehicle.

12. In our opinion, the evidence of Mr. Horsley's duties and responsibilities does not establish that he exercises managerial functions within the meaning of section 1(3)(b) of the Act. We find that Mr. Horsley does some supervision and reporting, but the actual managerial functions in respect of the respondent's operation that is the subject of this application rest with Mr. Reyns, Mr. Horsley's supervisor. Additionally, it is clear from the evidence that Mr. Horsley spends a considerable amount of time doing the same kind of physical work as the employees under his supervision. Based on all of the evidence before us, and the representations of the parties, we are satisfied that Mr. Horsley is an employee in the bargaining unit described above.

13. With respect to the applicant's challenge to Messrs. George, Bailey and Hines, we observe firstly that Messrs. George and Hines are on the list of employees who were at work in the bargaining unit in another application on the application date, that is, the Schedule "A" that was filed by the respondent in Board File No. 0509-85-R. As no one challenged their inclusion on that list, it appears to us that the parties have, at the very least, implicitly agreed that at least two of the three employees that the applicant challenged in this application were employees in the bargaining unit described in the application in Board File No. 0509-85-R on the date that both this application and that application were made.

14. Where more than one application for certification is made on the same day in respect of the same employer and involves more than one bargaining unit comprised of employees of the same employer, or one application for certification is made in respect of more than one bargaining unit, an employee can only be in one bargaining unit at the time the application is made. See *Laurent Lamoureux Co. Ltd.*, [1985] OLRB Rep. Nov. 1618 at 1623. Thus, while employees may, depending on their work, be employed in different bargaining units at different times, an employee can only be in one bargaining unit at any specific point in time. In certification proceedings the Board must assess the circumstances relevant to making the requisite determinations under section 7(1) of the Act as of two distinct points in time. The Board must ascertain how many employees were in the bargaining unit at the time the application was made. The Board considers the time the application was made as being the day on which the application was made. See *Windsor Tube & Metal Inc.*, [1977] OLRB Rep. June 396; *Bond Place Hotel*, [1982] OLRB Rep. Aug. 1135 at 1137-38; *Amplifone Canada Ltd.*, [1967] OLRB Rep. Dec. 840. Thus, the determination of the number of employees in the bargaining unit is made as of the day the application was made. Therefore, while an employee may be performing work that is normally done by employees in different bargaining units on the day an application is made, and may also have worked in different bargaining units both before and after the application date, the Board, for purposes of an application for certification will only consider an employee to be in one bargaining unit when the Board makes its determinations under sections 7(1) and 7(2) of the Act.

15. In this case, apart from the fact that the parties are apparently agreed that two of the three challenged employees were employed in another bargaining unit on the day that this application was made, the report of the Labour Relations Officer makes it clear to us that the three employees, who are classified as drivers, report to the company's shop daily from where they are dispatched. They are under the supervision of the truck supervisor, Bruce Davidson, who works

out of the company's shop. Although the three employees are involved in the transportation of product to and from the asphalt plant and gravel pit that is the subject of the instant application, we find that the three employees challenged by the applicant are not employees in the bargaining unit in this application since they do not work at and out of the Dale Road pit and asphalt plant, but rather report to and work out of the company's yard in Cobourg, which is the subject of the application in Board File No. 0509-85-R.

16. Therefore, on the basis of all the material filed the Board finds that more than fifty-five per cent of the employees of the respondent in the bargaining unit in Board File No. 0507-85-R, at the time the application was made, were members of the applicant on June 10, 1985, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

. . .
[Remainder of decision omitted: Editor]

1169-87-M; 1170-87-M Tony Hoosain, Complainant v. District Council United Brotherhood of Carpenters & Joiners of America, Respondent; Tony Hoosain, Complainant v. Local 27 United Brotherhood of Carpenters and Joiners of America, Respondent

Financial Statement - Reconsideration - Settlement - Financial statements prepared by certified general accountant provided to complainant pursuant to minutes of settlement - Complainant attempting to "re-open" complaint on the basis that statements must be prepared by a chartered accountant - Audited financial statement need not be prepared by a person licensed under the *Public Accountancy Act* unless Board so directs - Party not permitted to resile from settlement - Request to reconsider complaint rejected

BEFORE: R. O. MacDowell, Alternate Chair, and Board Members J. A. Rundle and J. Sarra.

DECISION OF THE BOARD; December 14, 1987

I

1. These are two applications made pursuant to section 85 of the *Labour Relations Act*. They were settled in accordance with a settlement document executed by the complainant on October 6, 1987. In a decision of the same date, the Board noted that the applications were withdrawn. The complainant now seeks to revive them.

2. In order to put the complainant's request in context, it may be useful to set out the provisions of section 85 of the Act, and also sketch in some background. Section 85 provides:

85.-(1) Every trade union shall upon the request of any member furnish him, without charge, with a copy of the audited financial statement of its affairs to the end of its last fiscal year certified by its treasurer or other officer responsible for the handling and administration of its funds to be a true copy, and, upon the complaint of any member that the trade union has failed to furnish such a statement to him, the Board may direct the trade union to file with the Registrar of the Board, within such time as the Board may determine, a copy of the audited financial state-

ment of its affairs to the end of its last fiscal year verified by the affidavit of its treasurer or other officer responsible for the handling and administration of its funds and to furnish a copy of such statement to such members of the trade union as the Board in its discretion may direct, and the trade union shall comply with such direction according to its terms.

(2) Where a member of a trade union complains that an audited financial statement is inadequate, the Board may inquire into the complaint and the Board may order the trade union to prepare another audited financial statement in a form and containing such particulars as the Board considers appropriate and the Board may further order that the audited financial statement, as rectified, be certified by a person licensed under the *Public Accountancy Act* or a firm whose partners are licensed under that Act.

II

3. The complainant, Tony Hoosain, is a member of Local 27 of the United Brotherhood of Carpenters and Joiners of America ("Local 27"). Local 27 is one of several local unions which together make up the District Council.

4. In the summer of 1987 Mr. Hoosain became concerned about the financial relationship between Local 27 and the District Council. He was particularly concerned about the advances of certain mortgage monies which, in his view, were contrary to the terms of the union constitution. On July 28, 1987 he filed the present complaints. He demanded a financial statement from both the District Council and Local 27. Following receipt of Mr. Hoosain's complaints, the Board scheduled a hearing.

5. A letter from Mr. Hoosain directed to the Registrar of the Board was received on September 2, 1987. It reads:

I am in receipt of your letter of August 19th, 1987 and have read the enclosures which appear to be at odds with the facts in this matter.

The statements prepared by Edmunds & Galgoczi C.G.A. that I received on July 30th not June 20th as stated were neither audited nor certified. As you are aware a C.G.A. is not licenced to provide an audit. I am enclosing copies of two letters that I received.

One dated July 20th for John Carruthers offering me the opportunity to view but not receive the statements. The other dated July 29th advises me that statements are to be provided to me. At no time as you can see was I informed that notice must be given. Perusal of the statements reveal several deficiencies. In any event the obligation of Local 27 under the act (to provide audited and certified statements) has not been fulfilled.

It is apparent that at least by the time he wrote that letter, the complainant's concerns included the fact that the individual preparing Local 27's financial statement was a certified general accountant (CGA) not a chartered accountant (CA), and in the complainant's opinion a CGA was not entitled to audit the union's books.

6. This matter was scheduled for hearing before the Board, in Toronto, on October 6, 1987. As we have already noted, on that day the parties entered into what purports to be a settlement of the matters in dispute between them. That settlement was reduced to writing and reads as follows:

MINUTES OF SETTLEMENT

BETWEEN:

Tony Hoosain

(hereinafter the "Complainant")

- and -

The Carpenters' District Council of Toronto and Vicinity

(hereinafter the "District Council")

- and -

Local 27, United Brotherhood of Carpenters and Joiners of America

(hereinafter "Local 27")

Whereas the Complainant filed a complaint dated July 27, 1987 against the District Council under Section 85 of the Act. (Bd. File No: 1169-87-M)

AND WHEREAS the Complainant filed a Complaint dated July 27, 1987 against Local 27 under Section 85 of the Act. (Bd. File No. 1170-87-M)

AND WHEREAS the Complainant, the District Council and Local 27 are desirous of resolving the aforementioned Complaint.

NOW THEREFORE the Complainant, Local 27 and the District Council agree as follows:

1. The Complainant acknowledges receipt of all audited financial statements of the District Council and Local 27 for the fiscal year ending June 30, 1987.
2. The Complainant acknowledges that said statements are privileged and confidential to Local 27 and the District Council.
3. The Complainant agrees that the tendering of the financial statement of the District Council is without prejudice to the District Council's position that the Complainant is not entitled to the statement inasmuch as he is not a member of the District Council and accordingly, the Complainant shall not rely upon receipt of the statement from the District Council in connection with any Complaint which the Complainant may file in the future in regard to his right to the financial statements of the District Council in ensuing fiscal years.
4. The Complainant agrees to withdraw the aforementioned Complaints.
5. *The Complainant agrees that the statements tendered to him in all respects comply fully with the provisions of the Labour Relations Act and accordingly, agrees not to file any further Complaints in connection with either the provision of financial statements or the adequacy thereof under any Section of the Act in connection with the fiscal year ending June 30, 1987 or any prior fiscal years.*
6. The Respondents agree that they have provided the Complainant with all audited financial statements prepared for and on their behalf under Section 85 of the Act for the fiscal year ending June 30, 1987.

DATED at Toronto this 6th day of October, 1987.

[emphasis added]

The file was closed.

6. By letter dated November 11, 1987 the complainant wrote the Board as follows:

Please be advised that it would appear necessary to re-open the above captioned complaints based on the information I have received subsequent to the filing of minutes of settlement in this matter. I am enclosing a copy of a letter received from the Public Accountants Council for the Province of Ontario that presents a totally different picture than previously was apparent.

As the financial statements received under the minutes of settlement filed in this matter were produced by this unlicensed individual, they would not appear to be sufficient to fulfill the requirement as set out in the Labour Relations Act.

Please review this matter and advise me of your thoughts in this regard.

In reply, counsel for the union wrote:

We are in receipt of your letter of November 16, 1987 enclosing a copy of Mr. Hoosain's letter.

As the Board is aware, Mr. Hoosain withdrew the instant complaints. He did so on the basis of Minutes of Settlement, filed with the Board, which were entered into with the assistance of a Labour Relations Officer. He now seeks to "re-open" his case on the grounds that the person who proposed the statements is not licenced under the *Public Accountancy Act*.

This fact was one well known to Mr. Hoosain when he signed the Minutes of Settlement. He had been provided with uncertified copies of certain statements in July 1987. He wrote to the Board in a letter, undated but stamped received on September 2, 1987, alleging they were inadequate as they were prepared by John Edmunds who is a C.G.A., rather than a C.A. The statements provided to Mr. Hoosain on October 5, 1987, clearly indicate they have been prepared by Mr. Edmunds. Hence, he cannot claim that he now intends to adduce evidence which was not previously available to him through the exercise of due diligence (*K-Mart Canada Ltd.*, [1981] O.L.R.B.R. February 185 at paragraph 4).

Further, as the Board is well aware, an audit required by Section 85(1) need not be performed by a C.A. or by a person with any formal accountancy qualifications: *Murray Strong*, [1981] O.L.R.B.R. July 901. Hence, even without Mr. Hoosain's agreement, such statements meet the requirements of Section 85(1).

We therefore submit it is not open to Mr. Hoosain to ask the Board to "re-open" a complaint he has withdrawn. He is not now alleging a fact (as opposed to a dubious legal opinion from the Public Accounts Council) unknown to him before the hearing. In any event, in the interests of finality, we submit the Board ought not to permit a party to resile from Minutes of Settlement freely entered into with the assistance of a Labour Relations Officer. Indeed, Section 89(7) provides that the settlement is binding on the parties, and the Board shall entertain only complaints of non-compliance with the agreement. The only party who appears not to be complying with these Minutes is Mr. Hoosain.

We therefore request the Board to deny Mr. Hoosain's request to "re-open" his complaint.

8. The issue before the Board, then, is whether, in all the circumstances, the Board should reopen the matters purportedly settled on October 6, 1987. Whether cast as a request for reconsideration or considered as an exercise of the Board's discretion under section 89 of the Act, the general principles are the same.

III

9. The purpose of section 89 of the *Labour Relations Act* is to secure a prompt, final, and binding resolution of unfair labour practice complaints; but, by the same token, the Act expressly recognizes and encourages the settlement of such complaints without a formal Board hearing or

decision. Where the matter complained of in a section 89 complaint has been settled, and the terms of the settlement have been put in writing and signed by the parties or their representatives, the settlement is binding. Indeed, section 89(7) makes non-compliance with a written settlement a breach of the Act.

10. Each year, trade unions, employees, or employers file hundreds of applications or complaints before the Board. A great majority of them are settled. Sometimes the settlement favours a trade union or the employer. Sometimes it may favour an employee. Usually the settlement represents a compromise under which the parties neither achieve as much nor risk as much as they would by proceeding to a hearing before the Board. The parties generally arrive at a settlement in order to avoid the cost and uncertainties of litigation. Both the orderly resolution of Board proceedings and the efficacy of the settlement process would be gravely prejudiced if, having signed minutes of settlement, a party could afterwards repudiate that settlement and revive the original proceedings because s/he later had second thoughts about the settlement terms.

11. A comparison of the language used in sections 85(1), 85(2) and 86(2) of the Act indicates that the "audited financial statement" contemplated by section 85(1) need *not* be prepared or certified by a person licensed under the *Public Accountancy Act* unless the Board so directs. In the absence of such direction, the financial statements which a trade union prepares for its own use (and must be provided to its members upon request pursuant to section 85(1)) may, therefore, be prepared by a CGA; moreover, since the complainant was obviously aware that a CGA was preparing the statement *prior* to executing the settlement, it is a little difficult to understand the basis for his present complaint. More important, however, is paragraph 4 of the settlement in which the complainant *accepts* the adequacy of the material provided to him, and *undertakes* not to file any further complaint. Yet that is precisely what his latest letter represents.

12. Under section 89 of the *Labour Relations Act* the Board has a discretion to enquire into any complaint of a breach of the Act. Under section 106, the Board has a discretion to reconsider any decision or ruling previously made by it. Whichever way one considers Mr. Hoosain's most recent request, it is our view that it should be rejected. Having reviewed the history of this proceeding and the parties' submissions, we see no reason to reopen, reconsider, or otherwise proceed with these complaints. The complaints were settled on October 6, 1987 and there is no basis for further enquiry.

1762-87-R Cecil DeHaan, Applicant v. United Food and Commercial Workers International Union, Local 633 and 175, Respondent v. Huntsville I.G.A., Intervener

Parties - Petition - Termination - Whether petitions should be rejected because they do not specifically identify the locals of the union affected by the application - Whether applicant can seek termination of bargaining rights in respect of three units when he is a member of only one unit - Local designation not significant to employees signing petitions - Employees found to have authorized applicant to file termination application on their behalf - Vote ordered

BEFORE: R. O. MacDowell, Alternate Chair, and Board Members J. A. Ronson and D. A. Patterson.

APPEARANCES: Cecil DeHaan on his own behalf; Harold F. Caley and Dennis Sexton for the respondent; K. Carrick and B. Taylor for the intervener.

DECISION OF THE BOARD; December 11, 1987, as amended January 18, 1988

1. This is an application for termination of bargaining rights made pursuant to section 57 of the *Labour Relations Act*. The relevant portion of section 57 reads as follows:

57.-(2) Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,

(a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation;

...

(3) Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at such time as is determined under clause 103(2)(j) that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

There is no dispute that this application is timely.

2. The intervener ("the employer"), as its name suggests, operates a retail food store in Huntsville, Ontario. Its employees are grouped for collective bargaining purposes into three bargaining units: a full-time bargaining unit of grocery clerks represented by Local 175 of the United Food and Commercial Workers International Union; a part-time bargaining unit of grocery clerks, also represented by Local 175 of the United Food and Commercial Workers International Union; and a full-time bargaining unit of meat department employees represented by Local 633 of the United Food and Commercial Workers International Union. For ease of reference these union respondents will be referred to simply as "Local 175" and "Local 633". Each of them, is of course, a "Local" trade union affiliated with, and subordinate to, its parent international organization.

3. In support of this application for termination of bargaining rights, Mr. Cecil DeHaan submitted several documents purporting to indicate the wishes of employees. The preamble to those documents entitled "PETITION" reads:

"We the undersigned employees of Huntsville I.G.A. no longer wish to be represented by the United Food and Commercial Workers' International Union, and we appointed Mr. Cecil DuHaan [sic] to represent us in this matter."

The documents contain a space and heading for the signature of each employee, a notation as to the date, time, and place, and a space for a subscribing witness which, in each case, was Mr. DeHaan himself. These documents, collectively, bear the signatures of 60% of the full-time grocery clerks, 69% of the part-time grocery clerks, and two-thirds of the employees in the meat department.

4. Having heard the evidence concerning the origination, preparation, and circulation of these anti-union petitions, we have no doubt whatsoever that they faithfully record the voluntary wishes of the employees who signed them. The evidence does not support the respondents' submission that Mr. DeHaan would be perceived as an agent of the employer, prompting employees to

worry that their refusal to support the anti-union petition would be duly reported to the employer and could result in reprisals. On the contrary. It is evident that, because of a protracted strike and resulting employee dissatisfaction, Mr. DeHaan - himself a vocal critic of the union's collective bargaining strategy - was able to persuade quite a number of employees to question the value of continued representation by the UFCW.

5. The union has two subsidiary arguments:

1. The union asserts that the employees' petitions should be rejected because they do not specifically identify and distinguish the Locals of the UFCW affected by this application. In the union's submission, because the employees have referred to the UFCW generally, and not the specific local associated with the specific unit, their petition should be disregarded. In support of that proposition the union relies upon the decision of the Board in *Hiram Walker and Sons Limited*, [1973] OLRB Rep. Nov. 603.
2. The union further asserts that Mr. DeHaan, being a meat-department employee, cannot be an "applicant" entitled under section 57(3) to seek termination of bargaining rights in respect of the full-time or part-time grocery clerks' unit of which he is not himself a member. In this regard we were referred to *Smale Brothers Company Limited*, [1986] OLRB Rep. July 1019, *Metal Closures Canada Limited*, [1965] OLRB Rep. May 130, *Graphic Centre (Ontario) Inc.*, [1977] OLRB Rep. June 379, *Dunnville Supermarket Limited*, [1980] OLRB Rep. Aug. 1193, *Rennie Sheet Metal Limited*, [1984] OLRB Rep. July 1004, and, *T. E. Leroux Contracting Ltd.*, [1982] OLRB Rep. Aug. 1204.

We shall consider each of these propositions, in turn.

6. *Hiram Walker* was a situation in which the evidence before the Board raised a real doubt about the employees' true intentions. There, the employees (or some of them) apparently sought to sever their relationship with the parent international union but continue to be represented by the respondent local union, which actually held the bargaining rights. The Board concluded:

We are satisfied that the signatories to these documents may very well have been confused as to the nature of the documents they were signing in that they may have misconstrued the purpose of this application as one designed merely to sever their relationship with the International Union, rather than as an application to effectively dispose of the bargaining rights of the respondent Local Union.

On that basis, the Board declined to give weight to the anti-union petition.

7. That is not at all like this case. It is abundantly clear on the evidence before us that a majority of the employees in all three bargaining units want to be rid of the United Food and Commercial Workers International Union in any of its local manifestations. No distinction between locals was made, because none was deemed to be necessary. From the employees' perspective, the particular local designation was not significant. They are rejecting the UFCW (of which they are, of course, also members by virtue of their membership in a local). That was the evidence concerning the employee meetings and discussions preceding the making of this application and, in our view, it would be entirely too technical, and inconsistent with the spirit of section 57 of the Act, if we were to reject this termination application on the first ground proposed by the respondents.

8. The second ground, however, is more problematic. Section 57(3) does appear to contemplate that a termination application can only be made by an employee in the bargaining unit affected by it, and, there is some support in the Board's jurisprudence for this proposition. In *Smale Brothers* it was held that a construction labourer, not at work on the application date, was

not an employee in the bargaining unit at the relevant time, and therefore had no status to bring a termination application. In *Metal Closures* it was held that an employee in a bargaining unit represented by one craft union could not seek to terminate the bargaining rights for another craft bargaining unit in the same enterprise. In *Graphic Centre* it also held that an individual excluded from a craft bargaining unit could not seek to terminate the craft union's bargaining rights. In

T. E. Leroux (supra) certain individuals not employed as carpenters on the application date were not entitled to seek termination of bargaining rights held by the Carpenters' union. Similarly, in *Rennie Sheet Metal* an employee outside the geographic scope of the bargaining unit represented by the union was not entitled to apply for termination of the union's bargaining rights. *Dunnville Supermarket*, however, supports the employees' position; because, there, the Board (in a somewhat different context) indicated a willingness to look beyond the mere form of the application and the "technicality" of the nominal applicant(s) in order to determine who the "true applicants were". The Board there decided that having recently dismissed one application by employee X made on behalf of a group of disenchanted bargaining unit employees, it should not readily entertain a subsequent similar application made on behalf of those same employees by employee Y.

9. None of these cases involve documentary or other evidence of the kind before us: a petition which clearly expresses the employees' wish to terminate their union's bargaining rights and a designation that the applicant, Mr. DeHaan, will represent them in this matter. The plain meaning or natural implication of those words is that the employees are authorizing Mr. DeHaan to file a termination application on their behalf. That reading of the petition document is entirely consistent with the evidence concerning the discussion with the employees which led to their signing of the petition document.

10. In our opinion we should not take an unduly "technical" view of applications such as these, and we are supported in that approach by cases such as *Gardiner's Supermarket Limited*, [1985] OLRB Rep. Dec. 1737; *St. Michael Shops of Canada Limited*, [1979] OLRB Rep. Oct. 1023; *Thomas Construction (Galt) Limited*, [1982] OLRB Rep. Nov. 1727 and *Cara Operations Limited (Retail Stores Division)*, [1984] OLRB Rep. Oct. 1378. Indeed, the situation in *Cara Operations Limited* is very similar to the present one because, there, the *nominal* applicants were members of a full-time bargaining unit, but the termination application and the related anti-union petition encompassed employees in the part-time bargaining unit as well. The Board found that the *nominal* applicants were making application both on their own behalf, and on behalf of the employees in the other bargaining unit. That approach was approved and followed by the Board in *Economy Fair*, [1985] OLRB Rep. Sept. 1357.

11. We are inclined to take the same view. In the instant case it is evident from the documentary and other evidence before us that the majority of the employees in each bargaining unit wish to terminate the respondent(s) bargaining rights, and have designated Mr. DeHaan to take such steps as are necessary to accomplish that objective. Indeed, had Mr. DeHaan framed his application as being on his own behalf and on behalf of the signatories to the supporting petition there would be no issue. But when the application and the petition document are read together, that is obviously the employees' intention, and we find nothing fatal in the omission of those words from the application's style of cause. While the nominal applicant (Mr. DeHaan) is a member of the meat department bargaining unit, we find that this application is, in fact, being made by a majority of employees of each of the three bargaining units, and that the documentary and other evidence before us warrants the taking of a representation vote to test the union's continued support.

12. The three bargaining units mentioned above in abbreviated form, are more particularly described as follows:

FULL-TIME FOOD STORE CLERKS UNIT

All employees of 388281 Ontario Limited carrying on business as Huntsville I.G.A. Market, at Huntsville, Ontario, save and except meat department employees, head cashier, department managers and persons above the rank of department manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.

PART-TIME GROCERY CLERK UNIT

All employees of 388281 Ontario Limited carrying on business as Huntsville I.G.A. Market in its store in Huntsville, Ontario, who are regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except head cashier, department managers and persons above the rank of department manager.

MEAT DEPARTMENT UNIT

All meat department employees of 388281 Ontario Limited carrying on business as Huntsville I.G.A. Market at its store in Huntsville, Ontario, save and except department managers and persons above the rank of department manager and persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.

13. A representation vote will be taken among the employees in each of the above-described bargaining units. The meat department employees will be asked whether they wish to continue to be represented by Local 633 of the United Food and Commercial Workers Union in their employment relationship with the intervener employer. The other grocery store employees in the other above-described full-time and part-time bargaining units will be asked to indicate whether they wish to continue to be represented by Local 175 of the United Food and Commercial Workers International Union in their employment relationship with the intervener.

14. Those entitled to vote will be all employees on the date hereof who do not terminate their employment with the intervener or are not discharged for cause between the date hereof, and the date on which the vote is taken.

15. The matter is referred to the Registrar so that appropriate vote arrangements may be made.

0166-87-R Paul Petrus, Applicant v. United Brotherhood of Carpenters and Joiners of America, Local 3054, Respondent v. Huron Steel Fabricators (London) Limited, Intervener

Petition - Termination - All employees laid off shortly after certification - Breach of sections 70 and 79 but not 64 and 66 - Applicant receiving guidance on petition from previously employed superintendent - Majority finding petition voluntary - Board discussing distinction between a petition in a certification application and a petition in a termination application - Vote ordered

BEFORE: V. Solomatenko, Vice-Chair, and Board Members R. W. Pirrie, and J. Sarra.

APPEARANCES: F. A. Angeletti, P. Petrus for the applicant; N. L. Jesin, S. Salvana for the respondent; and S. D. Gorelle for the intervener.

DECISION OF V. SOLOMATENKO, VICE-CHAIR AND BOARD MEMBER R. W. PIRRIE;
December 11, 1987

1. This is an application pursuant to section 57 of the *Labour Relations Act* for a declaration terminating the bargaining rights of the respondent trade union with respect to a unit of employees employed by the intervener employer in London, Ontario.

2. The application was filed on April 14, 1987. Article 27.01 of the collective agreement provides that it is binding and remains in effect from June 1, 1986 to May 31, 1987. It would thus appear that the application is timely. The union, however, has alleged that this application is untimely. Counsel notes that the collective agreement was signed on October 23rd, 1986 and the title page of the document indicates that the agreement was made and effective the 23rd day of October, 1986. Counsel submits that this results in some ambiguity because, since this is a first collective agreement, it cannot be made retroactive to a former expiry date and until the agreement is signed the parties are not bound by any collective agreement. He argues, therefore, that in accordance with section 52(1) of the Act the one-year term for this collective agreement should begin with the date of October 23, 1986. He acknowledges there is jurisprudence which holds that a collective agreement can be retroactive. Nevertheless, in this instance, he suggests that, in view of the title page, the collective agreement only makes payment of wages retroactive.

3. We confirm our oral ruling at the hearing that Article 27.01 of the collective agreement expressly sets out the duration of the collective agreement. There is nothing in Article 27.01, nor elsewhere in the collective agreement, which restricts the application of Article 27.01 to retroactivity for wages only. Section 52(1) of the Act has no application in these circumstances and the application is therefore timely in accordance with subsection 2 of section 57 of the Act.

4. Subsection 3 of section 57 of the Act reads as follows:

(3) Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at such time as is determined under clause 103(2)(j) that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

On the basis of the lists of employees filed by the employer, there were sixteen employees in the

bargaining unit as of the date of this application. In support of the application, the applicant has filed one document (hereinafter referred to as the "petition"), purporting to evidence the desire of eleven of these employees that they no longer wish to be represented by the respondent union. The petition thus contains in excess of 45 percent written support for a termination application, which is sufficient to cause the Board to order a representation vote to be taken under section 57(3) of the Act if it is satisfied that the individuals signing the petition have done so voluntarily.

5. As well as raising several allegations related to the origination or circulation of the petition, the union requests that the Board also take into account certain events or circumstances which have transpired since it was first certified in October, 1985. Shortly after certification, the company issued notices of indefinite layoff to all its employees such that by December 20, 1985, all had been laid off. Some employees were recalled in early January 1986 and most of the remaining employees were recalled at various stages thereafter. Prior to the layoffs, the company carried on business out of two locations, one of which was closed down during this period. These layoffs were subject of a section 89 complaint filed by the union which alleged that the company had violated sections 64, 66, 70 and 79 of the Act. By decision dated May 1, 1987, a differently constituted panel of the Board dismissed the complaint as it pertained to sections 64 and 66 of the Act. That decision further held that there was no anti-union animus on the part of the company and the layoffs were the result of unavoidable lack of work.

6. For purposes of the instant application, the union requests the Board to take into account the effect of those layoffs notwithstanding the Board's decision of May 1, 1987. Counsel notes that this was a substantial layoff of an entire bargaining unit and the first person to be recalled was Paul Petrus who is also the applicant in the instant application for termination. Counsel also notes that the Board's finding of no anti-union animus was not made known until May 1, 1987, whereas this application was filed on April 14, 1987. The union thus submits that in these circumstances one must still come to a conclusion that there would have been a perception of management involvement with the petition amongst the employees and fear of management reprisal.

7. The applicant, Paul Petrus, has been employed by the company since 1975. Mr. Petrus' evidence is that he signed for the union in 1985 more out of friendship for Joe Galera and was personally not happy with the union from the outset. His evidence is that shortly after the union was certified in 1985, he started making enquiries at Ministry of Labour offices with respect to what course of action he could take. He states he was advised that he should contact a lawyer. At this point he contacted a person to whom he referred to as a friend and who was previously employed by the company as a superintendent about six or seven years ago. Although it would seem that he does not see this person frequently he refers to him as a friend because he was the one who originally gave him the job with the company and has assisted him with personal matters in previous years. It is as a result of this contact that Petrus retained counsel who has acted on behalf of the petitioners in these proceedings.

8. The union submits that the Board should infer management involvement or at least a perception of management involvement in the petition from Mr. Petrus' evidence. Beginning with the matter of retaining counsel, counsel for the union notes that although Mr. Petrus refers to the former superintendent as a friend, the last time he spoke with him was in 1985 and he cannot recall when he visited him prior to that time. However, there was no evidence that this former superintendent maintains any contact with the employer or is in any way influenced by the employer subject to these proceedings. The fact the person was a superintendent six or seven years ago by itself cannot be the basis of drawing an inference of management involvement in this petition. Mr. Petrus' evidence is that this person has in the past assisted him with such matters as obtaining a job

and purchasing a home. In the circumstances, it is not unreasonable that he would turn to the same person for advice in obtaining a lawyer.

9. Counsel for the union also points out that there are varying stories from the witnesses as to what the arrangements are for payment of legal fees of the applicant's counsel. It would appear that not all employees were told from the outset that they would be asked to contribute towards the legal fees. Petrus' evidence however is that, although he has not collected any contributions from the other employees, he has advised them recently of his expectation. Furthermore, failing any contributions he states he is personally responsible for payment of the legal fees. Another point raised by counsel is that the evidence indicates that at least some employees came to this hearing without formally requesting leave of absence to attend the hearing. In our view, however, neither these matters can be the basis of a perception of management involvement. The fact that Petrus failed to discuss the obligation for legal fees when he initially approached the employees to sign the petition does not by itself result in the conclusion that employees would have inferred management would be paying for such fees. With respect to obtaining leave to attend the hearing, that deals with events after the application has been filed and terminal dates have been set. The fact that one or two employees may have attended the hearing without obtaining proper leave does not lead to the conclusion that the employer either encouraged or gave blanket approval to attend the hearing of this matter.

10. The union also refers to and relies upon certain evidence related to a petition which was started just prior to signing the collective agreement in October 1986. Mr. Petrus initiated that petition as well, but an application for termination was never filed at that time. Counsel for the union suggests that it seems coincidental that Mr. Petrus, although he was dissatisfied or unhappy with the union from the start, did nothing until such time that he by law would be entitled to take action. In our view, however, there is nothing unusual nor inconsistent in that action inasmuch as Mr. Petrus had sought out legal advice even prior to that date. His evidence is that he dropped the first petition on the advice of legal counsel and that in any event there were more persons wanting to sign. The Board also heard evidence, which was not disputed by the union, that the collective agreement signed on October 23, 1986, although signed by the union, had been rejected by the employees. As a result, there was a certain degree of unhappiness or discontent amongst the employees that the same contract they had rejected was in any event signed by the union.

11. The Board has consistently drawn a distinction between a petition filed in the context of an application for certification and one which is filed in support of an application for termination of bargaining rights. In *Ontario Hospital Association (Blue Cross)* [1980] OLRB Rep. Dec. 1759, at para. 31, the Board commented that:

The sole issue before the Board in every case regarding a "petition" is the voluntariness of the acts of signing. The Board has often drawn a distinction between petitions which are filed in connection with an application for certification, and those which accompany an application for termination of bargaining rights. In the former case, the Board has said that it must be sensitive to the role which management influence, devious or otherwise, may have played in causing employees who have only recently signed a card in support of a union to subsequently sign a petition which opposes the union. In the case of a termination application, the Board is not less concerned about influence by the employer, but there may, as a practical matter, be any number of reasons, including the mere passage of time, to readily explain the employees' apparent change of hearts. As the Board commented in *N. J. Spivak Limited*, [1977] OLRB Rep. July 462:

6. In contrast to a statement filed in opposition to an application for certification a statement of desire filed in support of a termination application under section 49 of the Act does not represent a sudden change of heart by those who sign it. The operation of section 49, a section designed to give vent to employee desires, requires the

passage of at least one year from the date of the union's certification before the Board will entertain an application for termination of bargaining rights. Because of the absence of an immediate change of heart, as happens when an employee signs himself into membership in a trade union and shortly thereafter signs a statement in opposition to the certification of the same union, and having regard to the purpose of section 49, the Board is less inclined to draw inferences adverse to the voluntariness of the statement filed in support of an application under section 49 of the Act.

12. Counsel for the union does not dispute the Board's jurisprudence as noted in the *Blue Cross* case. However, he suggests that in the context of that jurisprudence there should also be some consideration whether one is dealing with a long-term relationship, such as one of 20 years, or one which is relatively short-lived. In his view, the relationship between the parties subject of this applicant is sufficiently short-lived that the Board should view the petition herein as it would in a certification case.

13. As stated in the *Blue Cross* case, the sole issue before the Board in every case involving a petition is the voluntariness of the acts of signing. In the context of a certification case, the Board is more sensitive to the question of why an employee would have had a very recent and sudden change of heart in the relatively short period of time between the filing of the application for certification and the terminal date. That same criterion cannot apply in the circumstances of this case. The union was certified in October 1985 and this application for termination was filed in April, 1987. In our view, there has been sufficient passage of time such as to bring this case out of that category of cases where the Board would be more concerned with sudden changes of heart. As well, the employees' reaction to the union's signing of the collective agreement is evidence that, during the period after certification, not only was there the matter of the layoffs but there were also intervening events which could readily explain a change of heart in the previous support for the union. We are satisfied that the facts relating to the origination and circulation of the petition would lead to a conclusion that the petition reflected the voluntary wishes of the signatories. Furthermore, we do not concur with the union's submission that the evidence related to the layoffs leads to the conclusion that there was either a perception of management involvement in the petition or fear of management reprisals.

14. For the foregoing reasons, the Board is satisfied that the petition filed in support of this application is a voluntary expression of the true wishes of the employees signing it. The Board is further satisfied that not less than 45 percent of the employees of Huron Steel Fabricators (London) Limited in the bargaining unit represented by the respondent union at the time the application was made, had voluntarily signified in writing that they no longer wished to be represented by the respondent union as of May 11, 1987, the terminal date fixed for this application and the date the Board determines under section 103(2)(j) of the *Labour Relations Act* to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent union under section 57(3) of the Act. The Board therefore directs that a representation vote be taken of the employees of Huron Steel Fabricators (London) Limited. Those eligible to vote are all employees of the employer employed in London, Ontario save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

15. Voters will be asked to indicate whether or not they wish to be represented by the respondent union in their employment relations with Huron Steel Fabricators (London) Limited.

16. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER JANIS SARRA;

1. I dissent from the majority decision. The test for any application for termination of bargaining rights under section 57 of the Act is that the Board must satisfy itself that signatures on a petition for termination are a voluntary expression of employee wishes. I do not believe the Board in this case can satisfy itself of this voluntariness.
2. There are three principle reasons for coming to this conclusion:
 - (a) The Board's previous findings of violations of sections 70 and 79(1) of the Act indicate that these violations, while found not to be motivated by anti-union animus, produced a chilling effect on this workplace to the point that it is difficult to ascertain the voluntary wishes of the employees.
 - (b) The history of collective bargaining and sequence of events which characterize the labour relations in this workplace strongly indicates that this bargaining unit has never had sufficient chance to establish a collective bargaining relationship with the respondent.
 - (c) The evidence of the petitioner bringing this application was at times contradictory and vague. This combined with the cumulative effects of the factors cited above makes it difficult to be satisfied that the petition was voluntary.

For these reasons I would have dismissed the application.

THE CHILLING EFFECT OF THE SECTION 70 AND 79(1) VIOLATIONS:

3. The open period provided for in section 57 for termination applications provides a window for employees who have had the benefit of unionization to assess the merits of representation by their particular bargaining agent. It assumes that there has been at least some period of an established collective bargaining relationship in which to assess. It is true that the sole issue before the Board in assessing a petition for termination is the voluntariness of the acts of signing, but it is equally true that the Board looks to the surrounding events to the extent that they relate to the voluntariness issue and the way in which they have shaped employees perceptions. It is precisely this which the majority in this case has neglected to assess.
4. The Board recently in *Michel LeBlanc and Sudbury Mine Mill & Smelter Workers' Union v. Mansour Rockbolting Ltd.* [1986] OLRB Rep. Oct. 1346, made some useful comments on termination applications at paragraph 11:

"...But actual involvement by management in a petition for decertification or communications, direct or indirect, that failure to sign the petition carries with it negative employment consequences or which indicates that rejection of the union will bring forth benefits goes beyond mere opposition [to the union]. Such conduct does not have to be contemporaneous with the organization, preparation or circulation of the petition; it can occur before - but it is required that either contemporaneous or *prior conduct can reasonably be said to indicate to the employees that their support or non-support of a petition may influence their working conditions.* Furthermore, management influence does not have to actual; it is the perception of the employees which counts. The issue is essentially this: *is the climate in the workplace, over which the employer has control, such that the Board has a concern that the employees will not be able to express their wishes freely?...*"

[my emphasis added]

5. The majority in the case before us dismisses the union's argument that the Board should consider the employer's actions relating to layoff and recall as a message to employees that it was in their economic interests not to continue supporting the union. The majority wrote at paragraph 5.

"These layoffs were subject of a section 89 complaint filed by the union which alleged that the company had violated sections 64, 66, 70 and 79 of the Act. By decision dated May 1, 1987, a differently constituted panel of the Board dismissed the complaint as it pertained to sections 64 and 66 of the Act. That decision further held that there was no anti-union animus on the part of the company and the layoffs were the result of unavoidable lack of work."

6. The majority however fails to address the chilling effects of the violations this same panel of the Board did find, specifically violation of sections 70 and 79(1). To quote from the May 1, 1987 decision of the Board:

at paragraph 23:

"By transferring some of the maintenance work previously performed by Mr. Stevense to members of management, and contracting out the balance of such work, the respondent altered the terms and conditions of Mr. Stevense's employment, or altered a privilege previously enjoyed by him, contrary to section 79(1) of the Act."

and at paragraph 24:

"However, the Company contravened section 79(1) of the Act when, following the lay-off of Mr. Lyons, the Company contracted out *all* of its trucking requirements without the consent of the Union."

and at paragraph 26:

"The respondent further contravened section 79(1) of the Act by hiring Todd Campbell and rehiring Sean McCardle, without the consent of the Union, while existing employees, capable of performing the work which those two persons were hired to do, remained on lay-off."

and at paragraph 28:

"However, the evidence does establish that foreman Mike Hrib attempted to intimidate or coerce Messrs. Galera and Gaal into refraining from exercising their rights under the Act by telling them that Herman Fratschko was going to take action against them, and that neither the Labour Board nor the union would protect them. During the course of his conversation with Mr. Gaal, Mr. Hrib laughed hysterically and gestured in a manner which was suggestive of a person hanging himself. Having regard to all of the evidence, we find that those words and actions by Mr. Hrib in his capacity as a member of management constituted a contravention by the respondent of section 70 of the Act."

7. In this case we have the employer violating section 79(1), shortly after the bargaining unit is certified, specifically taking actions which directly affect the workers' employment status through contracting out of work, and the hiring and recall of new and less senior employees while more senior workers remained on lay-off. Such actions communicate to workers that the union is incapable of protecting or properly representing them and it may negatively affect their employment status if they have continued support for the union. The employer violation of section 70 is particularly relevant because the people negatively affected were known union supporters.

8. It is not enough for the majority in this case to say that the previous Board panel did not find anti-union animus in dismissing the section 64 and 66 complaints. That Board decision also usefully articulated the importance of section 79. It quoted *AES Data Limited*, [1979] OLRB Rep.

May 368 as summarizing the purpose and effect of the "freeze" imposed by provisions of section 79:

"10. The purpose of section 70 [now section 79] is to maintain the prior pattern of the employment relationship, in its entirety, while the parties are negotiating for a collective agreement. *This ensures that they will have a fixed basis from which to begin negotiations, and prevents unilateral alterations in the status quo which might give one party an unfair advantage either from the point of view of bargaining or of propaganda.* The status quo includes not only the existing terms and conditions of employment but also any other established benefits which the employees are accustomed to receive, and which can therefore be considered to be "privileges"."

and *Spar Aerospace Products Limited* [1978] OLRB Rep. Sept. 859 which describes the effects of section 79:

"What it does mean is, simply, that an employer must continue to run the operation according to the pattern established before the circumstances giving rise to the freeze have occurred, *providing a clearly identifiable point of departure for bargaining and eliminating the chilling effect that a withdrawal of expected benefits would have upon the representation of the employees by a trade union.* The right to manage is maintained, qualified only by the condition that the operation be managed as before."

9. The employer in this case accomplished exactly what the freeze provisions are designed to prevent. By negatively affecting the employment status of several employees in a small workplace, it produced a chilling effect to the point that employees would perceive that continued support for the union would alter their employment status. Protections under the freeze provision are even more crucial in a newly certified workplace where employee perceptions are more vulnerable to employer propaganda and actions which signal the union cannot effectively represent the workers.

10. It is unfortunate that the decision by the Board on the unfair labour practice complaints came 18 months after the fact. This time lag may well have contributed to employee perceptions that the union was unable to properly protect them in a wake of employer actions which had affected their employment status. The Board directed an extensive list of remedies in its May 1st decision including cease and desist orders, the reinstatement with lost wages and benefits of Jan Stevense and William Lyons and the posting of the Board's finding of employer violations, but these remedies were directed after the petition was circulated.

THE UNION HAS NEVER HAD SUFFICIENT CHANCE TO ESTABLISH A COLLECTIVE BARGAINING RELATIONSHIP.

11. In the majority decision the Board correctly draws a distinction between a petition filed in the context of a certification application, and one filed in an application for termination. The majority relies on a decision of the Board, *Ontario Hospital Association (Blue Cross)*, [1980] OLRB Rep. Dec. 1759 which says at paragraph 31:

"The sole issue before the Board in every case regarding a "petition" is the voluntariness of the acts of signing. The Board has often drawn a distinction between petitions which are filed in connection with an application for certification, and those which accompany an application for termination of bargaining rights. In the former case, the Board has said that it must be sensitive to the role which management influence, devious or otherwise, may have played in causing employees who have only recently signed a card in support of a union to subsequently sign a petition which opposes the union. In the case of a termination application, the Board is not less concerned about influence by the employer, but there may, as a practical matter, be any number of reasons, including the mere passage of time, to readily explain the employees' apparent change of hearts."

The majority of this panel then goes on to conclude at paragraph 13:

"The union was certified in October 1985 and this application for termination was filed in April, 1987. In our view, there has been sufficient passage of time such as to bring this case out of that category of cases where the Board would be more concerned with sudden changes of heart."

12. In any normal circumstances I would concur that an 18 month period is sufficient to move this case out of the category suggested by the majority. However, the sequence of events in this bargaining unit is such that it casts doubts upon the voluntariness of the petition. The same Blue Cross decision (*supra*) of the Board goes on to further characterize the issues before the Board in a termination application. At paragraph 32 and 33 the Board says:

"The Board still has upon it the statutory *obligation to ascertain from all the surrounding evidence* whether their actions in signing can be taken to have been voluntary..."

"The Board, therefore, must go on to consider the evidence of the manner in which this petition was circulated by its sponsors, and whether, based on that evidence, the Board has some reasonable assurance that the other employees who signed did so voluntarily. In doing so the Board must not lose sight, as indicated before, of the history of the present bargaining relationship and the time at which this application has arisen".

[my emphasis added]

13. The evidence in this case is of a workplace that has continually been under siege since the certification, and indicates that the union has never in the 18 month period been able to establish a healthy collective bargaining relationship with the employer. The chronology of events is not insignificant. The union is certified on October 11, 1985. The employees are given indefinite lay-off notices on October 25, 1985. In November, 1985 notice to bargain is given and some lay-offs occur. On December 20, 1985 the entire bargaining unit is laid-off. On January 7, 1986 the first recalls occur including the recall of Paul Petrus who is the termination applicant now before us; Petrus and others with less seniority are recalled first and unfair labour practices are filed by the union alleging violations of section 64, 66, 70 and 79. The hearings by the Board into the unfair labour practice span the time period to January 26, 1987 the last day of hearing. Meantime on October 14, 1986 Petrus circulates the first termination petition which is subsequently not filed on advice of his counsel. The union applies for the direction of first contract arbitration under section 40(a) of the Act and after settlement talk withdraws the application and signs a collective agreement on October 23, 1986. In early April, 1986 the majority of the bargaining unit is recalled and in this week and a half period the second termination petition is circulated, again at Petrus' initiation. On May 1, 1987 the Howe panel of the Board issues a decision on the unfair labour practices. On May 19, 1987 this panel of the Board convenes the hearing on this termination application.

14. So the history of the bargaining relationship, as the Blue Cross decision (*supra*) directs us not to lose sight of, is a history of lay-offs, contracting out, shutdown of one plant, the filing and litigation of unfair labour practice complaints, employer violations of section 70 where the Board ruled that the foreman sought to intimidate or coerce some employees into refraining from exercising their rights under the Act. It is difficult to believe that in light of this history, in the short eighteen months since certification that the union has had sufficient time to establish a healthy collective bargaining relationship, the merits of which the employees can freely assess in terms of representation of their interests. That surely is the purpose of section 57 and our tests of voluntariness.

15. It is a matter of public record that labour relations have still not been constructively established in the workplace. On August 31, 1987 after the hearing of our panel on the termination application, the Howe panel was reconstituted because the compensation for section 79(1) viola-

tions of the May 1, 1987 decision had not yet been settled or paid and the Board made a further ruling on this compensation.

16. I am not satisfied, given the cumulative effect of the history of the bargaining relationship that any petition circulated in the environment created by these employer actions could have reflected the voluntary wishes of the employees. To quote the Board in *Otto's Deli*, [1980] OLRB Rep. Nov. 1673 at paragraph 22:

“None of these factors operate independently and in our view their cumulative effect would be sufficient to suggest to the average employee that their employer actively wished them to reject their union and that they might suffer adverse employment consequences if they chose not to do so.”

EVIDENCE OF THE APPLICATION PETITIONER

17. I see no particular need to discuss at length the evidence of the Mr. Petrus, the applicant in this case because the above cited reasons have already led me to conclude the petition is involuntary. However, I wish to note that it is not his evidence of legal fees or arrangement of counsel (which is the focus of the majority comments) which concerned me. Rather, I was left doubting the credibility of the applicant given his inconsistent evidence. To give just one example as illustration, Mr. Petrus' evidence in cross examination was that there were no first “papers” against the union or petition; then he stated he circulated that petition but off company property; and finally his evidence was that at least in one case he solicited and received a signature on company time and premises. This contrasts with the credible testimony of Brian Judge hired after the union was certified and not involved in any campaign for *or* against the union. Judge's evidence was that he was requested by Petrus on two occasions in October 1986 and signed two different documents both on company time and property and that he assumed he'd be unemployed if he didn't sign. I also found Petrus' evidence on recruitment of employees to sign this petition extremely vague.

18. It is unnecessary to comment on whether these factors in themselves would cause the Board to decide the petition was involuntary, because it is clear that the cumulative effects of all the factors in the bargaining relationship are sufficient to cast serious doubt on the voluntariness of the petition.

19. For these reasons, I would have dismissed the application.

0542-86-R; 0035-86-U The United Food & Commercial Workers Union, Local 206, Applicant v. **Knob Hill Farms Limited**, Respondent v. Group of Employees, Objectors; United Food & Commercial Workers, Local 206, Complainant v. Knob Hill Farms Limited, Respondent

Certification Where Act Contravened - Charter of Rights and Freedoms - Unfair Labour Practice - Layoff and intimidation of employees, and granting of wage increases constituting unfair labour practices - Letter to employees from president of company proper exercise of employer free speech - Reverse onus not contrary to Charter - Petition rejected - First contract legislation not altering section 8 jurisprudence - Certificate issuing - Unnecessary for union to call every grievor as a witness - All laid-off employees reinstated with compensation

BEFORE: Ken Petryshen, Vice-Chair, and Board Members G. O. Shamanski and R. Wilson.

APPEARANCES: A. J. Ahee, D. MacMillan and D. White for the applicant; Michael Gordon and Howard Wood for the respondent; Donna Baydak and Maureen P. Kelly for the objectors.

DECISION OF KEN PETRYSHEN AND R. WILSON; December 22, 1987

I

1. Board File No. 0542-86-R is an application for certification. Board File No. 0035-86-U is a complaint under section 89 of the *Labour Relations Act* in which the United Food and Commercial Workers Union, Local 206 (referred to in this decision as "UFCW" and as the "Union") alleges that the respondent, Knob Hill Farms Limited (referred to in this decision as "Knob Hill" and as the "Employer") has contravened sections 64, 66, 70 and 71 of the Act. These alleged contraventions of the Act also form the basis of a request by UFCW that it be certified under section 8 of the Act. The proceedings in the two Board files referred to above were consolidated by the Board (differently constituted) in a decision dated June 19, 1986.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

3. Having regard to the agreement of the parties, the Board finds that all employees of the respondent at Oshawa, Ontario, save and except Assistant Store Manager, persons above the rank of Assistant Store Manager and office staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

4. On May 23, 1986, the date of the application for certification, there were 219 employees in the bargaining unit. As of June 7, 1986, the terminal date fixed for this application and the date which the Board determines under section 103(2)(j) of the Act to be the time for the purpose of ascertaining membership under section 7(1) of the Act, 81 employees in the bargaining unit (37%) were members of the Union. In mid-March 1986, Knob Hill laid off 14 employees. In its section 89 complaint, the Union alleges, among other things, that the lay-off of these 14 employees constitutes a contravention of the Act and that accordingly, the 14 employees should be treated as having been employed on the application date. If the Union succeeds in this aspect of its complaint, and if we were to assume that all 14 laid-off employees were members of the Union, the Union would have membership support on behalf of no more than 41% of the employees in the bargaining unit as of the terminal date. Therefore, the Union's best position would not entitle it to a representation vote under section 7(2) of the Act. In addition to the Union's membership evidence,

there was also filed with the Board a petition signed by 156 persons indicating that they wish to oppose the certification of UFCW. This petition included the names of 44 individuals who had previously become members of UFCW.

5. The hearing of this matter by the present panel required fourteen days, the last two being devoted to entertaining the parties' submissions. During the course of the proceedings, the Board issued two interim written decisions and was required to make a considerable number of oral evidentiary rulings. The Board heard evidence from 18 witnesses. In making our findings of fact, we have carefully considered all of the oral and documentary evidence, the credibility of the witnesses and the submissions of the parties.

II

6. When the parties appeared on the first scheduled hearing day, they agreed before another panel of the Board to argue a constitutional issue and to exchange written submissions on that issue prior to the next scheduled hearing day. It was also agreed at that time that the Union would proceed to call its evidence first. During the first day of hearing before the present panel, the Board entertained submissions from the parties as to whether section 89(5) of the *Labour Relations Act* is of no force or effect, as argued by counsel for the Employer, because it is contrary to section 15(1) of *The Constitution Act, 1982*, of which the *Canadian Charter of Rights and Freedoms* is a part. At the conclusion of the submissions, the Board advised the parties that it would reserve its decision.

7. In presenting his argument on the *Charter* issue, counsel for the Employer took the position that the matter was a "necessary preliminary and threshold issue" which required a determination by the Board prior to hearing any evidence. In counsel's submission, the rules governing the case must be determined at the outset since they would have an effect on the questioning of witnesses and the calling of evidence. Counsel for the Union opposed an adjournment of the proceedings and argued that the Board should proceed to hear evidence on the next scheduled hearing day, August 7, 1986. When it advised the parties that it would reserve its decision on the *Charter* issue, the Board also ruled orally that it was not prepared to adjourn the proceedings as requested by counsel for the Employer. The Board indicated that reasons for its ruling would follow. Counsel for the Employer then advised the Board that he was obligated to formally request reconsideration of the Board's ruling. Counsel noted that he anticipated his request would be denied since he had no new evidence or argument to put before us. The Board, after recessing to consider the request for reconsideration, orally ruled at the hearing that the Employer's request for reconsideration was denied.

8. In denying the Employer's request to adjourn the proceedings pending the Board's decision on the *Charter* issue, the Board had regard to a number of considerations. The matters before it concerned a representation issue and the lay-off of 14 persons which was continuing. For obvious labour relations reasons, it is important that matters such as these be heard and disposed of as expeditiously as possible. Given the nature of the argument and the number of cases referred to, it was unlikely that the Board would have been in a position to provide the parties with a decision on the *Charter* issue for some time. The Board considered the basis upon which the Employer sought the adjournment. In balancing all of the interests in the circumstances of this case, the Board was satisfied that proceeding with the hearing on the basis of the existing law until it decided the *Charter* issue was the appropriate course to follow.

9. During the course of the hearing on November 18, 1986, and prior to the Employer calling evidence, the Board provided the parties with its decision on the *Charter* issue without reasons. On that date, the Board orally advised the parties that section 89(5) of the *Labour Relations Act*

does not conflict with section 15 of the *Charter*. Counsel for the Employer then requested reasons for the Board's decision and he argued that the proceedings should be adjourned until the reasons were provided. Counsel submitted that the reasons were necessary in order for him to advise his client and seek instructions. After considering the matter, the Board orally ruled at the hearing that it would not adjourn the proceedings until it was in a position to provide the reasons for its decision. In the Board's view, it was not necessary for the Employer to have our reasons on the *Charter* issue before it called its evidence. We were satisfied that the Employer would not be prejudiced if the Board were to proceed without giving reasons at that time. The Board directed that the proceedings would continue on the next scheduled hearing date.

10. When the *Charter* issue was argued, counsel for the Employer advised us that he had made the same argument in another Board case and that the decision in the matter had not yet been issued. Counsel provided us with the names of those authorities which were relied upon in this proceeding and had not been relied on when the argument had been made previously. Subsequent to our decision on the *Charter* issue, the Board (differently constituted) on December 22, 1986, released the decision in *Shaw-Almex Industries Limited*, [1986] OLRB Rep. Dec. 1800 wherein the Board found there was no conflict between section 89(5) of the *Labour Relations Act* and section 15 of the *Charter*. Taking into account the argument before us, including a consideration of those cases which had not been referred to the *Shaw-Almex* panel, we adopt the reasons given by the Board in *Shaw-Almex Industries Limited*, *supra*, as our own.

11. The Board notes that in deciding the Union's section 89 complaint, it was unnecessary for us to apply section 89(5) of the Act. The Board has previously addressed the question of when it would be appropriate to apply the reversal of the burden of proof. In *The Barrie Examiner*, [1975] OLRB Rep. Oct. 745, the Board made the following comments at page 748:

"... The onus of proof only comes into play after the trier-of-fact has found the evidence to be so evenly balanced that no clear conclusion can be drawn. See *Robin v. National Trust Co. Ltd.*, [1927] 2 D.L.R. 98 (J.C.P.C.). In this situation, the trier-of-fact must then fall back upon the rule relating to the location of the onus of proof, and make an evidential finding against the party upon whom the burden rests. Rules as to the onus, therefore, are rules of evidence, establishing a procedure to be followed where the evidence of two opposing parties is evenly balanced. Support for this conclusion can be found in *R. v. Krumps*, [1931] 3 D.L.R. 767 (Man. C.A.); dicta to the same effect can be found in *Attorney General V. Halliday*, [1866-87] U.C.Q.B. 397 and *Sanders v. Malsbury*, (1882), 1 O.R. 178..."

More recently, the Board noted in *Knob Hill Farms Ltd.*, [1983] OLRB Rep. July 1087 in paragraph 8 that section 89(5) "is only triggered where there is no evidence before the Board or where the evidence before the Board is equally balanced".

12. In reviewing the evidence in order to reach a conclusion on the factual issues before us, we were not confronted with a situation where the evidence was evenly balanced. We were able to resolve the factual issues on the balance of probabilities without recourse to section 89(5). In saying this, of course, the Board does not mean to suggest that the evidentiary onus of proof at times did not shift to the Employer. As the evidence is adduced, it is not uncommon for the evidentiary onus to shift from one party to another. It is often the case in section 89 complaints of this type, as it was in reviewing the evidence in the instant complaint, that the onus shifts to the Employer to convince the Board that its actions were not motivated in part by an anti-union animus. This is so even in the absence of the application of section 89(5).

III

13. Prior to setting out the facts and our findings, it is useful to examine section 8, its pur-

pose and the approach the Board has taken in dealing with section 8 cases. Section 8 of the Act provides as follows:

8. Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

14. Section 8 essentially has a twofold purpose. The section is designed to deter employers from illegally interfering in union organizing campaigns. In addition, it provides a remedy in those cases where the employee selection process has been destroyed by illegal employer activity. As the Board has frequently noted, it is not every violation of the Act by an employer which would cause the Board to direct section 8 relief. Certification can be granted under that section only if the following conditions are met:

- (1) the respondent employer must have contravened the *Labour Relations Act*.
- (2) the applicant trade union must have membership support that, in the opinion of the Board, is adequate for the purposes of collective bargaining.
- (3) the respondent employer's contravention of the Act must have resulted in a situation in which the true wishes of the employees are not likely to be ascertained.

15. In assessing whether an applicant has membership support adequate for collective bargaining, the Board considers a number of factors. Those factors are reviewed in *Manor Cleaners Limited*, [1982] OLRB Rep. Dec. 1848, at paragraph 21:

The issue of whether membership strength is adequate under section 8 has been found by the Board in prior cases not to be simply a question of numbers or percentages. In *Viceroy Construction Company Limited*, [1977] OLRB Rep. Sept. 562, the Board stated in paragraph 22:

No arbitrary percentage can be arrived at that will apply in all cases. The Act requires the Board to determine what is adequate membership support by the light of its opinion depending on the facts of each case. In forming its opinion in any case the Board must have regard for all the circumstances.

Some of the circumstances or factors which have been considered by the Board in assessing "adequacy" are:

- (1) the stage of the union's campaign at which the employer conduct occurred (*Skyline Hotel Limited*, [1980] OLRB Rep. Dec. 1811; *District of Algoma Home for the Aged (Algoma Manor)*, [1979] OLRB Rep. Apr. 269);
- (2) the circumstances surrounding the cards signed prior to the employer interference and the number of cards signed (*Lorain Products*, [1977] OLRB Rep. Nov. 734);
- (3) the existence of a full-time unit which showed membership sufficient to support collective bargaining by its part-time counterpart (*Robin Hood Multifoods*, [1981] OLRB Rep. July 972 and; *Windsor Airline Limousine Limited*, [1981] OLRB Rep. Mar. 398);

- (4) the severity of the employer conduct insofar as it related to the number of cards signed - "the chilling effect" (*K-Mart*, [1981] OLRB Rep. Jan. 60);
- (5) the percentage of unit signing the cards where support for the union is at an extremely low level (5%) (*Somerville Belkin*, [1980] OLRB Rep. May 796).

In assessing adequacy the Board must engage in some measure of speculation regarding the union's prospects of successfully engaging in the sequel to certification, collective bargaining. If the union can and has mustered the totality of its support in the bargaining unit certification under section 8 should not be used to foist union representation on those employees who would not have chosen this freely for themselves. The assessment must be taken with care (see *Skyline*, *supra*, at paragraph 62).

16. Often the most difficult task for the Board in adjudicating a section 8 case is in determining whether employer violation(s) have created a climate in which the true wishes of employees cannot be ascertained. Although each case must be decided on its own particular facts, the Board commented on some of the factors which it considers when confronted with this issue in *The Globe and Mail Division of Canadian Newspapers Company Limited*, [1982] OLRB Rep. Feb. 189:

The Board has found in a number of cases that the employer, in violating the Act, made threats to the continued job security of his employees conditional on whether the union succeeded in its attempt to become certified. In these cases, the Board concluded that the employer violation of the Act was such as to make it unlikely that the true wishes of the employees could be ascertained. An employee is unable to express his true wishes where he has been told by his employer, either expressly or impliedly, and has reason to believe, that the selection of a union may cause the company to reduce the scale of its operation or close down with an attendant reduction in the number of jobs. (See *Dylex Limited*, *supra*, *Lorain Products (Canada) Ltd.* [1977] OLRB Rep. Nov. 734, *Riverdale Frozen Foods Limited*, [1979] OLRB Rep. Apr. 338, *Straton Knitting Mills Limited*, [1979] OLRB Rep. Aug. 801, *Somerville Belkin Industries Limited*, [1980] OLRB Rep. May 79 and *A. Stork and Sons Ltd.*, [1981] OLRB Rep. Apr. 419).

17. The Board recognizes that it is appropriate to take a cautious approach in granting section 8 relief since granting a certificate has considerable legal ramifications. This sentiment is reflected in the following passages from *Trulite Industries Limited*, [1983] OLRB Rep. May 821 at page 827:

24. The competing policy considerations which underlie section 8, are aptly set out by the British Columbia Labour Relations Board in commenting on a similar provision in its own statute. In *International Brotherhood of Boilermakers, Lodge 359 and Forano Limited* (1974) Can. L.R.B.R. 13, the Board observed at page 20:

... Certification without a vote ... creates a real disincentive to the use of [intimidatory] kinds of tactics. It does so by depriving the offender of the fruits of its unlawful conduct ... However, that is just part of the case for this remedy, because the party primarily affected by the certificate is the employees. We can assume that the Legislature did not want to visit the sins of the employer or the union on the innocent employees, who, after all, are supposed to be the beneficiaries of this freedom of choice about collective bargaining. Accordingly, the remedy is to be used where one cannot feasibly determine the true wishes of the employees through the normal means ... I think everyone is aware of the risks involved in that kind of certification. In some cases, the employees may have foisted upon them a bargaining representative which they really don't want. Undoubtedly, the remedy must be carefully used...

25. As the above comments indicate, the wishes of the employees are always the Board's primary concern, and the remedy is not meant to be punitive; moreover, where support is not really there, the Board would not be placing the union in an enviable position by granting a certificate. Without the support of the employees the union would have a difficult time negotiating a collective agreement, and it would ultimately face the prospect of a termination application. On the other hand, the Board must not hesitate to consider the provisions of section 8 when it is

the employer's own misconduct that impairs the Board's ability to ascertain with more certainty what the wishes of the employees really are. As the British Columbia Board went on to say:

... The Board must not be afraid to use it [the certification remedy] when it appears appropriate. The Legislature conferred it for the very good reason that there is another equally serious risk to employee freedom. The majority in a unit may really want collective bargaining but have been intimidated from choosing it openly. The only way they will get it, is for the Board to certify the union...

IV

18. Knob Hill operates a retail food sales business. It has a number of retail outlets in Toronto and vicinity and has approximately 1,400 employees. The Oshawa store, the object of the Union's organizing campaign, has approximately 220 full-time and part-time employees. Until mid-May 1986 the distribution function was located in the Oshawa store. This function was transferred at approximately that time to the newly-opened Weston Road store.

19. Various unions have attempted unsuccessfully in the past to certify some of Knob Hill's retail outlets. UFCW initiated its organizing campaign during the first week of March 1986 after the Local Union was approached by some of Knob Hill's Oshawa employees. M. Flannigan, an international representative, was the co-ordinator of the campaign. Two of the Union's representatives, a number of international representatives, and some Knob Hill employees were involved in attempting to obtain membership cards during the campaign. Some employees signed cards at their homes while others signed at the work place. As indicated previously, it was on March 21 and March 24, 1986 that Knob Hill laid off 14 employees at its Oshawa store. It was late in the evening on March 21, 1986 when most of the 14 employees were advised of their lay-off. From March 6, 1986, when the first card was signed, to March 21, 1986, the Union obtained 85 membership cards. On March 17, 18 & 19, just prior to the lay-offs, the Union signed 35 cards. From March 21, 1986 to March 24, 1986, the Union collected 7 cards. From March 25, 1986 until the terminal date, a period of over two and a half months, the Union obtained 17 cards.

20. In addition to the lay-offs referred to above, the Union alleges that Knob Hill contravened the Act in other respects. On March 27, 1986, S. Stavro, the President of Knob Hill, distributed a letter to the Oshawa employees. On March 29, 1986, Knob Hill gave all of its employees a wage increase. Full-time employees received a \$1.00 an hour increase, while part-time employees received an additional 50¢ per hour. During the relevant period of time, officials of the company, either through discussions with employees or in other ways, allegedly dealt with employees contrary to the *Labour Relations Act*. Before dealing with the lay-offs, we will address these other aspects of the Union's complaint.

21. The letter from Stavro dated March 27, 1986 to the Oshawa employees reads as follows:

March 27, 1986

Dear Fellow Employees:

There are two matters that have been causing you and your fellow employees some concern.

Firstly, there have been rumours that Knob Hill Farms has been sold - this is *absolutely false*.

Secondly, a Union is again trying to organize members of the store. The law provides that you have the absolute right to join a trade union if you want to. You should also understand that you *don't* have to join a trade union. The law protects you from pressure and no one can force you to join a Union if you don't want to do so.

Several employees have been upset that Union organizers have been calling them at home or showing up at their place of residence. Remember, you *don't* have to talk to them on the telephone; you are entitled to hang up. If you don't want to let people come into your home, you don't have to open the door.

What we, at Knob Hill Farms, have achieved, has been done without the presence or interference of a third party or outsider.

I have seen the kind of co-operation which exists between our employees and management. I see the benefits and wage levels that have been achieved voluntarily, and the kind of co-operation there is between employees of the Company.

I am in the store on a regular basis and enjoy the one-to-one contact with the employees. If there are problems, then let's talk about them.

Shortly, the North York Food Terminal will be opening. The distribution department is to be moved to the new Terminal. This change will result in staff transfers and promotions.

With your continued support and assistance, Knob Hill Farms will continue to grow and prosper.

Best wishes for a Happy and Safe Easter.

Yours very truly,

Steve Stavro

22. It was argued by the Union that the letter from Stavro had an impact on employees during the campaign. It was suggested that by underlining the word "*don't*" in paragraphs 3 and 4, Stavro communicated to employees the Employer's desire to remain union-free. We have examined carefully the substance of Stavro's letter, as well as the circumstances surrounding its distribution to employees. We are satisfied that Stavro's letter does not constitute a contravention of the Act. In our view, the letter does not come within the prohibitions in section 64 of the Act but rather comes within the caveat to the section guaranteeing employer free speech. In *Dylex Limited*, [1977] OLRB Rep. June 357 in paragraph 19, the Board noted that "employees recognize that employers generally are not in favour of having to deal with employees through a trade union, and that therefore it ought not to surprise them when their employer indicates that he would prefer it if they voted against a trade union". Stavro's letter does no more than convey to the Oshawa employees that Knob Hill prefers to remain non-union.

23. Knob Hill gave all of its 1400 employees a wage increase on March 29, 1986, including of course, the Oshawa employees. The Employer does give annual wage increases to its employees and it also gives increases when a new store opens. The Employer takes the position that the granting of the wage increase on this occasion was consistent with its general practice. Counsel pointed out that this position was supported by the fact that the increase was company-wide and not limited to the Oshawa employees. The Union argued that the wage increase represents an attempt by the Employer to interfere with its campaign. In reviewing the evidence relating to the wage increase, the Board has considered evidence relating to certain conversations between management officials and bargaining unit employees.

24. During the evening of March 25, 1986, W. Harrison, assistant store manager, had a conversation with Paul Craig, a student working in the bread section. P. Craig's version of the conversation is as follows. P. Craig asked Harrison whether the employees would be getting raises. Harrison responded by saying "it depends on whether you give me your thing", and explained that the "thing" costs one dollar and is blue (the Union membership cards are blue). Harrison asked P.

Craig if he signed and P. Craig explained he did not. After indicating more than once that he did not sign, P. Craig asked if the failure to hand him a card would result in his not receiving a raise. Harrison said maybe. P. Craig made notes of his conversation with Harrison on the day of the discussion and these notes were made an exhibit. Harrison's version of the conversation with P. Craig was quite different. He testified that P. Craig approached him and asked him what would happen to people who signed a union card. Harrison asked P. Craig if he signed a card. When P. Craig said he did not, Harrison advised him that he did not have anything to worry about. When Harrison was shown for the first time the notes taken by P. Craig of their conversation, he indicated that there was no truth to what was contained therein.

25. Rondha Hasted has been employed by Knob Hill as a cashier since February 1986. She testified that shortly after the lay-offs, Mike Nickolau, the store manager, approached her while she was working and asked her if she supported Knob Hill. Nickolau advised her that Knob Hill was one big happy family and that if she had any problems she should see him. Nickolau then advised her that employees would be getting a dollar an hour raise and asked her not to discuss this with other employees. Sean Craig is a full-time employee in the grocery department. He testified that he had a discussion with Nickolau in mid-March prior to the lay-offs in which he asked Nickolau for a raise. Nickolau asked him if he was a company man. After S. Craig responded affirmatively, Nickolau said he would look after him. In his evidence, Nickolau denied making any of the statements attributed to him by Hasted or S. Craig.

26. We prefer the evidence of P. Craig, Hasted and S. Craig to that of Harrison and Nickolau. We are satisfied that Harrison, in effect, asked P. Craig to give him his membership card and indicated that a failure to do so might affect whether or not he received a raise. After considering the submissions of counsel for the Employer concerning the notes of P. Craig's conversation with Harrison, we are satisfied that the notes were made by P. Craig and that they reflect the substance of his conversation with Harrison. We are also satisfied that Nickolau, at a time when he was aware of the Union's organizing efforts, made the statements attributed to him by Hasted and S. Craig. In essence, Nickolau was inquiring of Hasted and S. Craig whether they supported the Employer or the Union. Knob Hill contravened sections 64 and 70 of the Act when Nickolau and Harrison had the conversations referred to above with the three bargaining unit employees.

27. The Board finds that Knob Hill contravened sections 64 and 70 of the Act when it gave the wage increase at the time it did. Although we are satisfied that Knob Hill does have a practice of granting its employees a regular wage increase, the evidence does not support a conclusion that the granting of a wage increase on March 29, 1986 was consistent with its policy. Representatives of the Employer became aware of the Union's organizing campaign approximately in mid-March 1986. Within two weeks of that time, a significant wage increase was granted to all of Knob Hill's employees, including the Oshawa employees. Although it was suggested by the Employer that a store opening, in this case the opening of the Weston Road store, caused the Employer to grant a wage increase, the wage increase was granted 1 1/2 months before the opening of the Weston Road store. When the granting of the wage increase is viewed in light of the statements we found management to have made to P. Craig, Hasted and S. Craig, we are satisfied that the wage increase was connected with the Union's organizing campaign at the Oshawa store. After reviewing all the evidence concerning the wage increase, including the timing of the increase and the employer's justification for the increase, the Board finds that the granting of the wage increase on March 29, 1986, at least in part, was motivated by anti-union considerations.

28. Derek Lacelle started with Knob Hill in September 1985 and is a full-time employee in the meat department. Lacelle is in the Army Reserve on a part-time basis. Subsequent to mid-March 1986, an employee advised Lacelle that Gus Nicov, meat buyer and store supervisor, wished

to speak with him. Lacelle testified concerning the substance of their conversation. After being introduced, Nicov asked him if he knew about the Union. Lacelle replied that he did. Nicov advised Lacelle that he knew he was signing people up on company time and that he could get fired for this activity. Lacelle maintained that he signed people up on his own time. Nicov asked whether he liked to work for the company and whether he might be going into the army full-time. Lacelle replied yes to the first question and maybe to the second. Nicov then asked Lacelle if he knew what the army did with deserters. Lacelle replied that deserters are shot in a combat situation. Nicov said that the company works the same way and that by helping the Union Lacelle was not doing Knob Hill any good. Nicov asked Lacelle how he would like it if he spent 40 years in a business and then had someone come in and tell him how to run the business. Nicov advised Lacelle that unions were no good and took one's money in dues.

29. In his evidence, Nicov described his conversation with Lacelle in a way which was significantly different from Lacelle's evidence. Nicov explained that although Lacelle had been with Knob Hill for some months, he had not met him. Since another employee advised him of some problems concerning Lacelle, he decided to have a talk with him. He began their conversation by asking how long he had been with the company and whether he was happy. After discussing why Lacelle did not work on some weekends, Nicov advised Lacelle that in every family there were rules and regulations that must be obeyed. Nicov said he asked Lacelle whether he was a full-time or part-time soldier only for the purpose of determining whether he would stay with Knob Hill for any length of time. Nicov indicated that it was important to get the job done right, and that as long as he did not create any problems he had a guaranteed job at Knob Hill. Shortly after the discussion ended, Lacelle returned and advised Nicov that he was involved with the Union. Lacelle offered to provide Nicov with the names of the people who signed. Nicov told Lacelle that he was not interested in the names and that what he did outside of the store was his own business.

30. After reviewing the evidence of Nicov and Lacelle, and the manner in which they gave their evidence, the Board prefers the evidence of Lacelle. The Board finds that Knob Hill contravened sections 64, 66 and 70 of the Act when Nicov had the discussion referred to above with Lacelle. We are satisfied that Nicov was aware of Lacelle's union activity and that the purpose of his conversation with Lacelle was to convince Lacelle that his conduct was contrary to the Employer's interests and could affect his continued employment with Knob Hill. Nicov's conversation with Lacelle was a blatant attempt to interfere with Lacelle's rights under the *Labour Relations Act*.

31. Shortly after the lay-off, three employees from other stores operated by Knob Hill were transferred to the Oshawa store. It was alleged by the Union that the transfer of these three persons into the grocery department was an attempt to replace employees who were laid off. The evidence discloses that it is common for Knob Hill to transfer employees between stores in order that they may benefit from a broader experience. The three employees in this case were transferred to Oshawa in order that they could obtain experience in a larger store. When these persons were transferred to Oshawa, employees in Oshawa were transferred to other stores. The decision to transfer the three employees to Oshawa was made by Knob Hill in February 1986, which was prior to the Union's organizing campaign. The Board finds that in transferring the three employees to the Oshawa store shortly after the lay-offs of March 21 and 24, 1986, Knob Hill did not contravene the Act.

32. Rhonda Hasted and Giovanna Del Gobbo testified about an incident which occurred shortly after the lay-off. Del Gobbo, who left the employ of Knob Hill in May 1986, and another three cashiers were asked by Risto Popovski, an assistant store manager, to wait at the conclusion of their shift in an area adjoining the front office. The office is in an open area so they were able to see Popovski and L. Cervini, store supervisor, whispering back and forth to each other. Cervini

was on the phone and both he and Popovski frequently looked at the employees near the front office and laughed. After anywhere from five to ten minutes, Popovski advised the employees that they could go and that there would be no meeting. Since all of the cashiers were employed less than three months and because the lay-off had just occurred, the employees were scared and embarrassed. They felt they were going to be told they were laid off as well. Cervini recalled an occasion when he saw a number of cashiers on benches in front of the office area at approximately 10:00 p.m. Cervini could not remember asking them to stay and denied staring at them although he may have looked at them. Popovski did not testify.

33. The Board is satisfied that the incident concerning the cashiers constituted an attempt on the part of the Employer to intimidate the cashiers and to interfere with their right to join a trade union, contrary to sections 64, 65 and 70 of the *Labour Relations Act*. The timing of this incident and its unusual nature suggest that Popovski and Cervini were attempting to communicate to employees who were in their probationary period that the Employer can affect their future employment and that support for the Union is not in their best interests. Popovski, the person who initiated the incident, was not called to explain why he asked the cashiers to wait after work.

34. Sean Craig began working for Knob Hill in October 1983 and, as indicated previously, he was employed at the relevant time as a full-time grocery clerk. S. Craig assisted the Union in obtaining membership cards. On May 22, 1986, he was suspended for a week by Nickolau for being late. The disciplinary notice he received reads as follows:

Sean Craig (03)

7:18 AM

To Oshawa

Date May 21/86

Sean hasn't shown for work as of yet. He has been warned on numerous occasion [sic]. On April 22/86 he signed a document stating that he would be reprimanded should it occur again. Since then there have been numerous occasions that he was late for work. I have been lenient with him because of fear of grievances because of his role with the union campaign at this store. I put a lot of thought in the situation and come [sic] to a conclusion that regardless of the situation I have to do my job as required and decided to reprimand by giving Sean a week off work without pay commencing May 22/86 until May 28/86. He will return to work May 29/86 at 7:00 A.M. Should there be one other occurrence lateness [sic] after the date of May 29/86 Sean will be dismissed from his job.

"Mike Nickolau"

"Nick Altas"

"Sean Craig"

35. The Union argues that S. Craig was disciplined at least in part because of his union activity. The Employer, on the other hand, argued that the only reason S. Craig was disciplined was because of a lateness problem which had persisted for a considerable period of time. Having reviewed all of the evidence relating to the suspension, the Board is satisfied that Knob Hill did not contravene the Act when it suspended S. Craig for a week on May 22, 1986. The evidence discloses that S. Craig did have a problem getting to work on time. He was warned about his lateness and on April 22, 1986 he was advised that if he continued to be late he would face a week's suspension or dismissal. We accept Nickolau's evidence that S. Craig's union role played no part in his decision to suspend him and that, but for his union activity, Nickolau would have imposed a more severe penalty, perhaps discharge. Other employees may very well have been late, but no one had a lateness record as bad as S. Craig's.

36. In his opening statement and in final argument, counsel for the Employer submitted that Knob Hill did not contravene the Act when it laid off fourteen employees in the third week of

March 1986. In taking this position, counsel emphasized a number of points. The Employer has experienced a number of organizing attempts, including a previous attempt to organize the Oshawa store employees. The Employer made it clear to its employees in this campaign and in previous ones that they are free to join a trade union of their choice and participate in its lawful activities. The managerial persons who testified indicated that they were aware of the Employer's policy of non-interference regarding unionization and most of them expressed the view that they would be fired if they failed to adhere to the policy. Counsel submitted that the lay-offs arose in the normal course of business, occurred as a result of appropriate business concerns and had nothing to do with the Union's organizing attempt.

37. Nickolau and Cervini testified that they were the ones who decided that a lay-off was necessary and when and how the lay-off would be executed. In approximately the first week of March 1986, they determined there would be a lay-off with the final decision being made during the week ending March 23, 1986. They decided that the lay-offs would occur in the grocery and buggy areas. Any employee in these areas who was hired subsequent to January 1, 1986 would be laid off. Of the fourteen employees laid off, ten worked in groceries and four worked in buggies. The group of fourteen was made up of both full-time and part-time employees. The majority of these employees were advised of their lay-off at the completion of their shift by Cervini on March 21, 1986. When the employees were told of the lay-off, reference was made to a shortage of work and the transfer of the distribution centre. Nickolau had other commitments on March 21, 1986 and could not stay at the store past 7 p.m. All of the laid-off employees had not yet completed their probationary period and had no advance warning from the Employer that they would be laid off. At least four of the laid-off employees were hired in February 1986 and one was hired in March 1986, subsequent to the time the Employer made the decision to lay off.

38. All of the employees who were laid off had signed a membership card for the Union. Four of these employees signed cards dated March 21, 1986, while all of the others were signed prior to that time. A review of the membership cards signed by the fourteen laid-off employees discloses that a number of the employees signed at the commencement of the organizing campaign. A review of the membership evidence generally reveals that two of the fourteen laid-off employees were actively involved in obtaining membership cards for the UFCW.

39. Cervini held the position of store manager in Oshawa for the month of November 1986. During that time, he concluded that the hours worked by employees were too high. In addressing this concern, he was confronted with two alternatives. He could either lay off employees or cut the number of hours worked by employees. He elected to cut hours. He began with the cashiers and just prior to leaving the store manager's position, he began to cut the hours of employees working in the buggy area. At the end of November 1985, he assumed the newly-created position of store supervisor which gave him responsibilities for all the Employer's stores. One of the primary functions of the store supervisor's position was to cut costs. When Nickolau became the store manager in November 1985, Cervini explained to him what he had been attempting to accomplish.

40. Cervini and Nickolau testified that when they decided at the beginning of March to lay off employees, their decision was based on a shortage of work. In particular, they were conscious of the fact that the distribution centre would be moved from Oshawa to Weston Road. In addition, they referred to a number of changes in the store which caused the Oshawa store to be over-staffed. We have carefully reviewed the evidence relating to the employer's justification for the lay-offs and its timing. After reviewing the evidence and the parties' submissions, we are satisfied that the decision to lay off fourteen employees in the third week of March 1986 was motivated in part by anti-union considerations and therefore constitutes a contravention of sections 66 and 70 of the *Labour Relations Act*.

41. The evidence discloses that the Oshawa store ceased operating as the distribution centre at the beginning of April 1986. For a period of time before the beginning of April, less product was being sent to Oshawa for distribution, and very little product was distributed from Oshawa to other stores after the beginning of April. The distribution centre was transferred to the Weston Road store which opened on May 14, 1986. The Weston Road store is centrally located and has a larger area to accommodate a distribution centre. The Employer took the position that the persons who performed functions connected with the distribution centre would have to be transferred to other areas of the store. But only two persons connected with the distribution function at Oshawa were moved to the grocery and buggy areas. Bruce King went to the buggy area at the beginning of April and George Coulouras went into the grocery area. The actual impact on the grocery and buggy areas insofar as a transfer of personnel is concerned was minimal.

42. Cervini and Nickolau testified concerning changes which created the need to lay off employees. The buggy system was changed in the summer of 1986. The preparations for the change occurred in April-May 1986. The Employer, prior to the summer of 1986, utilized a system where the customer would take a buggy and simply leave it in the lot when finished with it. Employees in the buggy area would be involved in retrieving the buggies as well as other duties. With the new system, the buggies are located in various carrels on the lot. The customer takes a buggy and is encouraged to return the buggy to the carrel. A new system for dealing with buggies was considered in the winter of 1985-1986 and, as indicated previously, was implemented in the summer of 1986.

43. Rather than bagging groceries, Knob Hill supplies its customers with boxes. Prior to the summer of 1985, Knob Hill utilized cardboard boxes. These boxes would be delivered by tractor trailer and made up by an employee of Knob Hill. Beginning in the summer of 1985, Knob Hill began a process of eliminating the cardboard boxes and using plastic boxes in Oshawa. Over a period of time, plastic boxes were used predominantly, although the cardboard boxes have not been completely eliminated.

44. In approximately January 1986, Knob Hill initiated a new method of stocking its shelves. In addition, shortly after the lay-off, it began to handle its product differently. We do not propose to set out the details of these changes. We are satisfied in examining these changes, both with respect to their timing and substance, that they can provide little justification for the lay-offs in the third week of March 1986. We have come to the same conclusion regarding the change in the buggy system and the change from cardboard to plastic boxes. The new buggy system was not operative until the summer of 1986, some time after the lay-offs. The change from cardboard to plastic boxes would have a minor impact and one that would have been felt in 1985 rather than during March 1986. The transfer of the distribution centre did have some impact on the grocery and buggy areas, but in our view, that impact was minor. We note that the lay-off occurred over a week before the distribution centre was transferred to Weston Road. More importantly, we are not satisfied that the impact of this change warranted the significant lay-off which occurred during the third week of March 1986.

45. After Cervini left the store manager position, he testified that Nickolau would continue on with the task of cutting hours. There is no evidence before us to indicate that Knob Hill cut hours in its Oshawa store after that process was initiated by Cervini in November 1985 in the cashier and buggy area. Even if one accepts the employer's evidence that some action was necessary in March 1986 as a result of excessive hours, Knob Hill was faced again with a decision of whether to lay off or cut hours. Cervini testified that at that time the process of cutting hours had run its course and lay-offs were required. But there is no evidence to support this assertion. The Employer made no effort to cut hours of employees working in the grocery area at Oshawa. Dur-

ing the time that Cervini was a store supervisor, other Knob Hill stores were involved in cutting hours and did not lay off any of their employees.

46. The laid-off employees were working a considerable number of hours preceding the lay-off. Most worked their regular hours in addition to working overtime. One of the laid-off employees, C. Lockhart, was scheduled to work on March 22 and 23, Saturday and Sunday. Employees testified that after the lay-off, Popovski, Harrison and a security person were involved more frequently in stocking shelves. There was also evidence that the store was not kept as clean subsequent to the lay-off as before since the Oshawa store was now short-staffed. D. Hobin, an employee in the grocery department, testified that just prior to the lay-off, Knob Hill hired an employee to assist him in his area. Apparently he had made a number of requests for such assistance. This particular employee was one of the fourteen that were laid off. Hobin testified that with the lay-off of this employee he was now in the same position he was in previously. When he needed assistance, he would attempt to get help from other employees, but often discovered that they were too busy to assist him when he wanted them.

47. After reviewing all of the circumstances, including the timing of the lay-off and the reasons put forth by Knob Hill to justify the need for a lay-off in the third week of March 1986, we are satisfied that part of the reason Knob Hill laid off the fourteen employees when it did was because of a desire on its part to interfere with the union's organizing attempt. Although some business justification for taking some action existed (we are referring here to the transfer of the distribution centre), we are led to conclude that part of the reason for Knob Hill deciding to lay off employees when it did was to communicate to its employees that an attempt to organize can adversely affect their employment.

48. Before concluding this aspect of the case, the Board wishes to comment on three matters. The parties placed before us a considerable amount of evidence which they characterized as "economic" evidence. Primarily, this evidence related to sales figures and hours of work figures for the relevant period of time. We have reviewed this evidence carefully and find it to be of little assistance. Secondly, the Union called witnesses which gave evidence concerning what was said to them by persons who they perceived to be managerial but who the parties agreed were in the bargaining unit. Counsel for the Union argued that this evidence was relevant to the issue of whether the Employer contravened the Act. We admitted this evidence on the understanding that counsel would be establishing a link between those persons in the bargaining unit who were perceived to be managerial and management. Since the Union was unable to establish such a link, we did not rely on any of this evidence in arriving at our conclusion that Knob Hill contravened the Act. Finally, during his cross-examination, Nicov said that "the lay-off was not done just because of the Union" and then made reference to the transfer of the distribution centre. He testified previously that he played no role in the lay-offs and clarified his statement in re-examination. The Board is satisfied, when reviewing Nicov's evidence as a whole, that he did not intend to suggest that one of the reasons for the lay-off was the presence of the Union when he used the words he did.

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49. Having established that Knob Hill contravened the *Labour Relations Act*, there is an onus on the Union to satisfy the Board that it has membership support adequate for the purposes of collective bargaining and that the Employer's contraventions of the Act must have resulted in a situation in which the true wishes of the employees are not likely to be ascertained.

50. In reviewing evidence concerning whether the Union has membership support adequate for collective bargaining, the Board has considered the factors referred to in *Manor Cleaners Limited, supra*. The Union has filed membership evidence on behalf of approximately 40% of the

employees in the bargaining unit as of the terminal date. The Union's organizing campaign had been in effect only for approximately two weeks prior to the lay-offs of March 21, 1986. The campaign was gaining momentum just prior to the lay-off. Although the Union was able to obtain some membership cards subsequent to the lay-off, the campaign slowed down considerably and virtually died prior to the application for certification being filed.

51. We have considered the petition filed by the objecting employees. Mrs. Baydak, a cashier, gave evidence in support of the petition. She became aware of the Union's application for certification on May 29, 1986 when she saw the Form 6 Notice to Employees. Baydak attempted to obtain information concerning the substance of the Notice from Nickolau and Mr. Wood, the Employer's general counsel. They advised her that they could not assist her. After discussing the matter of unionization with other employees, Baydak initiated the petition. She began to obtain signatures on the petition at the Employer's premises during working hours. Nickolau became aware of this and warned her not to engage in such activity while she was working. From this point on, Baydak attempted to secure signatures only during non-working periods, although a few employees did approach her while she was working. Nickolau became aware of the fact that Baydak had acted contrary to his previous warning. He called her into his office and gave her a written warning. In her testimony, Baydak gave some general evidence concerning the manner in which the petition was circulated. Of the 156 names on the petition, Baydak signed as a witness for less than half. Baydak did not give direct evidence concerning the circumstances in which each signature on the petition was obtained.

52. Before the Board gives any weight to a petition, it must be satisfied that the persons signing the document did so voluntarily. There is an onus on the party relying on the document to satisfy the Board concerning its origination, preparation and circulation. The petition must be free from the actual or perceived influence of management. See, *Lo Food Division of Lumsden Brothers Limited*, [1983] OLRB Rep. May 676.

53. The Board is not prepared to give the petition filed in this matter any weight in deciding whether the union has membership support adequate for collective bargaining. The Board has no direct evidence before it with respect to the specific circumstances in which each signature was obtained. See, *Skelhorns Bus Line Limited*, [1986] OLRB Rep. Oct. 1435. In addition, the petition was signed a relatively short time after certain Employer conduct which we have found to have contravened the Act. The lay-offs, the timing of the monetary increase and the other unfair labour practices constitute serious contraventions of the Act. Having regard to all of the circumstances and, in particular, the unfair labour practices and the lack of evidence as to the circulation of the petition, we cannot be satisfied that the petition represents the voluntary wishes of those persons who signed it.

54. In deciding whether the Union has support adequate for collective bargaining, we have considered a submission of counsel for the Employer concerning the Form 9 declaration. In the course of giving his evidence, J. Martin, a key employee organizer, indicated that he turned in his cards along with the dollar payment to someone other than the Form 9 declarant and that the Form 9 declarant did not enquire of him as to whether he did collect a dollar from each person he signed. J. Martin signed as collector on two membership cards filed with the Board. Counsel argued that there was an obligation on the Form 9 declarant to make direct enquiries of each collector, including J. Martin. Counsel stated that the failure of the Form 9 declarant to make direct enquiries of J. Martin should cause the Board to dismiss the application or, at least, it should cause the Board to conduct an enquiry into the adequacy of the Form 9.

55. In addition to filing evidence of membership, the Union is obligated to have someone

attest to the regularity and sufficiency of the membership evidence by filing with the Board a Statutory Declaration. Paragraph 3 of the Statutory Declaration reads as follows:

3. (Where the documentary evidence consists in parts of receipts or other acknowledgments of the payment on account of dues or initiation fees.) On the basis of my personal knowledge and inquiries that I have made, I state that the persons whose names appear on the receipts or other acknowledgments of the payment on account of dues or initiation fees are the persons who actually collected the moneys paid on account of dues or initiation fees and that each member on whose behalf a receipt or an acknowledgment of payment is submitted has personally paid in money the amount shown thereon on his own behalf to the person whose name appears on his receipt or acknowledgment of payment as collector. EXCEPT IN THE FOLLOWING CIRCUMSTANCES: ...

In *National Steel Car Corporation Limited*, [1966] OLRB Rep. Jan. 738 at paragraph 13, the Board comments on the kind of knowledge which is required as a precondition to signing the Statutory Declaration (Form 9):

.. It is readily apparent that a person completing Form 9 must be seized with some type of knowledge in order to satisfy the requirements of item 3 cited above. This knowledge may be personal knowledge (i.e.) knowledge gained by either acting as the actual collector or knowledge gained by being personally present and actually witnessing the transaction between the collector and the member wherein the membership card was signed and payment of money made by the member to the collector.

The other type of knowledge which is acceptable is that knowledge gained from enquiries made of the persons who actually acted as collectors, or *the persons who made the necessary inquiries of the actual collectors*.

The requirement that inquiries be made is obviously not an onerous one or one that imposes an undue burden on the applicant; however, the requirement is that *inquiries be made*.

In order that inquiries be meaningful it is obvious that they must be made after the event. Instruction given to collectors prior to the signing of members may be helpful or necessary in the carrying out of an organizing campaign, however, such instructions do not obviate the necessity of making the inquiries required for the proper completion of Form 9. (See *Dominion Stores Limited* case, [1964] OLRB Rep. Dec. 447).

[emphasis added]

56. The Form 9 declarant is not required to make enquiries of every collector. Although it may be advisable for a Form 9 declarant to adopt such an approach, it is sufficient if he or she obtains information from persons who made the appropriate inquiries of the actual collectors. The fact that the person signing the Form 9 in this case did not make direct enquiries of J. Martin, in and of itself, is not a reason to dismiss the application nor a reason that would cause the Board to enquire into the Form 9.

57. Counsel for the Employer submitted that the approach the Board has adopted in section 8 cases should be reconsidered as a result of the amendment to the Act providing for first contract arbitration. Counsel suggested that section 8 conflicts with the generally accepted majoritarian principle. Prior to the recent first contract amendment, the true test of whether a union had sufficient support to engage in bargaining occurred at the bargaining table. If the bargaining unit employees were not in favour of the union or its bargaining stance, a union would likely not be able to conclude a collective agreement. Since the first contract provisions of the Act provide for a situation where the union may get a first collective agreement (even though support for the union is very low) from bargaining unit employees, it was submitted that the Board should lean towards the majoritarian principle in its application of section 8.

58. We reject the suggestion that the recent first contract legislation provides a basis for altering the way in which the Board interprets and applies section 8 of the Act. As noted earlier, the purpose of section 8 is to provide a remedy for trade unions where illegal employer activity has destroyed the ability of employees to choose freely. In part, the first contract provisions represent another remedy to assist trade unions and employees in their initial efforts at collective bargaining in situations where the failure of the union to gain or maintain support from employees is attributable to illegal or other undesirable conduct on the part of an employer. The certification stage and the first collective agreement stage represent the first two steps in a continuing process, and the section 8 and first contract remedies are two distinct legislative responses designed to promote collective bargaining. An approach by the Board which leaned towards the majoritarian principle would limit the availability of a section 8 remedy, a remedy which attempts to address situations where the Union has not succeeded in receiving majority support because of an employer's illegal conduct. In our view, such a result was not intended by the Legislature when it enacted the first contract provisions. A greater emphasis on the majoritarian principle would be inconsistent with the purpose of section 8 which addresses circumstances where the true wishes of employees (the majority view) are not likely to be ascertained. In addition, Counsel's argument appears to suggest that access to an arbitrated first collective agreement is automatic. This, of course, is not the case. Since there can be no direction to settle the first collective agreement by arbitration unless it can be demonstrated that bargaining has been unsuccessful because of one or more of the reasons set out in section 40a(2), it is clear that a certificate does not automatically entitle a union to an arbitrated collective agreement under the *Labour Relations Act*. It is difficult to appreciate why the existence of the first contract remedy should affect the way in which section 8 is interpreted and applied when its availability is anything but certain.

59. After considering the matters referred to above, the Board is satisfied that the Union has membership support adequate for collective bargaining.

60. In determining whether the Employer's contravention of the Act resulted in a situation in which the true wishes of the employees are not likely to be ascertained, we have considered the following submissions from counsel for the Employer. Counsel argued that it was not the Employer's conduct which caused the Union's campaign to fail. He submitted that the Union's campaign had peaked prior to any alleged illegal activity and that the Union quit organizing subsequent to the lay-offs. Secondly, counsel argued that other events occurred subsequent to the lay-offs which caused employees to repudiate the Union. Finally, counsel directed us to the evidence of the Union's witnesses who testified that the Employer's conduct would not prevent them from voting for the Union. He argued that this evidence should lead the Board to conclude that the employees were still able to freely choose whether they wanted the Union to represent them.

61. M. Flannigan testified concerning the Union's organizing campaign. The Board is satisfied upon a review of all the relevant evidence that the campaign had not peaked prior to the lay-offs. The dates on the membership evidence disclose that the Union was gaining momentum immediately prior to the March 21, 1986 lay-offs. Subsequent to the lay-offs, the number of cards the organizers were able to obtain declined significantly. The Board is satisfied that after the lay-offs and the pay raise the Union continued to organize, but with limited success.

62. During his cross-examination, Flannigan was asked about some alleged incidents which occurred after the lay-offs. Flannigan denied any knowledge concerning the following four alleged incidents. On March 25, 1986, packages of cereal in the store were slashed. On March 29, 1986, 200 kilograms of rice spilled when the bag was sliced. On April 1, 1986 Frank Blandini's tires were punctured and Cervini received a threat. Flannigan had heard about two incidents although his knowledge concerning them was second-hand and not very extensive. He had heard that the radia-

tor and a tire on the store manager's car had been damaged on March 26, 1986. Flannigan also had heard that there was a fire in the store on April 8, 1986. He was unaware that the Fire Marshall suspected arson. It was put to Flannigan that if the events referred to above occurred, and if the employees were aware of them, and if for one reason or another employees thought union supporters were responsible for the incidents, then the Union campaign would suffer. Flannigan agreed that it probably would have some effect on the campaign. He indicated that employees were advised by the Union not to engage in such conduct. Counsel for the Employer suggested that if the Union lost support after the lay-off it was because of the events described above.

63. The Board has no direct evidence before it regarding the events put to Flannigan in his cross-examination. The management witnesses who were called to testify did not give evidence with respect to any of the alleged events. There is no evidence before us regarding the extent to which employees in the bargaining unit were aware of these alleged events. In these circumstances, it is very difficult for the Board to conclude that these alleged events caused employees to turn against the Union. The Board declines to give the evidence concerning these alleged events much weight. Even if the Board were to conclude that these alleged events had an impact on the Union's campaign, this would not mean, of course, that other events, such as the Employer's illegal conduct, did not have an impact as well.

64. In assessing whether the Employer's violations of the Act have created a situation in which the true wishes of the employees are not likely to be ascertained, the Board utilizes an objective test. The Board's approach and its reasons for it are addressed in the following paragraphs in *Zest Furniture Industries Limited*, [1987] OLRB Rep. Feb. 299:

37. In examining whether the employer's contraventions have resulted in a situation where the true wishes of employees are not likely to be ascertained, the Board applies an objective rather than a subjective test. The Board described it in this way in *Robin Hood Multifoods Limited*, [1976] OLRB Rep. May 250:

In other words, it must be demonstrated by *some objective measure* that the contravention of the Act, whether by any overt act or subtle subterfuge is so perverse that the likelihood of a meaningful expression of employee views is lost.

[emphasis added]

38. In some cases, the Board has referred to the impact of employer misconduct on an "employee of average intelligence and fortitude" (*Wolverine Tube, Division of Calumet and Hecla of Canada Limited*, 63 CLLC ¶16,296) while in others the bench mark has been expressed in terms of the "typical employee" (*Seven-UP/Pure Spring Ottawa*, [1984] OLRB Rep. Jan. 87). The Board will examine both the nature of the employer's misconduct and the circumstances in which it took place, and its conclusions will vary depending on the specific mix of factors that it finds in any particular situation.

39. Where the impact of misconduct is obvious, it may be that no demonstrative evidence will be required. As the Board noted in *Robin Hood Multifoods*, *supra*:

There may be occasions, however, where the contravention would so obviously undermine the likelihood of a free vote (such as a direct or implicit threat to employees' job security) that no demonstrative evidence need be adduced with respect to [whether the conduct was such that the true wishes of the employees were not likely to be ascertained].

40. In other cases, it may be useful for the parties to adduce facts which might enlighten the Board as to the effect of less obvious misconduct in the circumstances of a specific work place, including objective facts which may show that the impact of certain activities is enhanced or diminished in the particular circumstances. But in all cases the test the Board uses will not be how or whether employee "A" or employee "B" was personally affected, but rather the likely

impact of the misconduct on the typical employee. Consequently, it is neither necessary nor desirable for the parties to parade a series of employees before the Board to testify as to their individual responses or feelings as a result of the employer's activities.

41. Not only is such a procedure time-consuming and expensive, but the evidence proffered is often unreliable. (See *Manor Cleaners Limited*, [1982] OLRB Rep. Dec. 1848). The Board commented on this problem in *Wolverine Tube*, *supra*:

Our colleague, in his dissent, apparently takes the position that as there is no direct testimony from the employees themselves that they were in fact influenced by the conduct of the employer, there is, therefore, no evidence before us on which we can properly find that [a previous vote] did not disclose the true wishes of the employees. It is, of course, a trite principle in the law of evidence that no party is bound to prove all of its case by direct evidence. Reasonable and necessary inferences may and must be drawn from all the evidence adduced and that which is clearly inferable from the evidence it is much proved as if it had been established by direct evidence. *Indeed, in reaching a decision as to whether or not employees have or have not been influenced by improper conduct on the part of a union or employer, the Board has often been constrained to view the objective facts and overt acts of the parties with the reasonable inferences to be gathered from them, as more persuasive evidence of the true facts than the subjective assertions and counter assertions of employees, given in the presence of the union or employer, that they were or were not influenced or in what way, by the conduct in question.*

[emphasis added]

42. Where such evidence supports the employer's point of view, the peculiar vulnerability of employees can result in a desire on their part to publicly associate themselves with their employer. As the Board commented in *Brinks Canada Limited*, [1982] OLRB Rep. Aug. 1140:

Firstly, the Board's procedures do not favour the taking of viva voce evidence from employees in the presence of their employer at a Board hearing as the optimal means of determining their wishes respecting union representation. The Board's jurisprudence has long recognized the natural affinity of an employee to identify, publicly, at least, with the interest of his employer.

43. Indeed, where an employer has engaged in unfair labour practices, it may be difficult to know whether such testimony has itself been influenced by those activities. (See: *Lorain Products (Canada) Limited*, [1977] OLRB Rep. Nov. 734.)

44. Even where the evidence is brought out through union witnesses, it may be of little value when the Board has no way of knowing whether a witness is representative of other employees. The fact that the views of a union stalwart remain unchanged does not tell the Board very much about the views of those who are less committed. The Board's task is to assess the impact of particular misconduct on the ability of a typical employee to express his or her wishes, that is, one who is neither unusually intrepid nor unusually timid.

65. The fact that those persons called by the Union indicated that their support for the Union and their ability to vote was unaffected by the Employer's conduct can be given little weight. The majority of the union's witnesses were obviously strong union supporters. The fact that their views concerning the Union remain unchanged is not particularly surprising, and is of little assistance in determining the impact of the Employer's unfair labour practices on the typical employee.

66. The Board finds that the Employer's contraventions of the Act, particularly the lay-offs and the wage increase, have resulted in a situation in which the true wishes of employees are not likely to be ascertained. We are satisfied that the Employer's conduct in laying off fourteen employees became common knowledge to the employees working at the Oshawa store. Such a response by the Employer to the Union's organizing campaign would convey the message that sup-

port for the Union can bring with it adverse employment consequences. In circumstances such as these, as the Board has commented on in a number of decisions, the issue for employees becomes not whether they wish to be represented by the Union in collective bargaining, but do they wish to keep their jobs. See, *Brink's Canada Limited*, [1982] OLRB Rep. Aug. 1140; *Aurora Resthaven Extended Care & Convalescent Centre*, [1986] OLRB Rep. Aug. 1031. The Board is satisfied that any of the remedies it could grant under section 89 would not restore the atmosphere existing prior to the Employer's illegal conduct so that employees would be able to choose freely whether they wish to be represented by the UFCW or not.

67. Having found that the three conditions for a section 8 determination have been met, the Board is satisfied that this is an appropriate case in which to exercise its discretion to certify the UFCW. A certificate will issue to the applicant in respect of the agreed to bargaining unit set out in paragraph 3 of this decision.

68. The Board has found that Knob Hill has breached the Act in a number of respects. Pursuant to section 89 of the Act, we direct that Knob Hill:

- a) forthwith reinstate Chris Lockhart, Jay Martin, Andrew Bernie, John Wray, Jerry Kyle, Dale Clarke, Alan Bolduc, Dan Hennessy, Brad Rumford, Darrin Tessier, Sean Kelly, Peter Boudrey, Glen Chamberlain and Edson Costillio to employment at the Oshawa store;
- b) pay to those persons named in paragraph (a) compensation for any loss of wages and benefits as a result of their lay-offs, plus interest thereon calculated in the manner described in Practice Note No. 13;
- c) cause copies of the attached notice marked "Appendix" as supplied by the Board to be signed by the Oshawa store manager and posted in conspicuous places on its Oshawa store premises where they are likely to come to the attention of bargaining unit employees and keep such notices posted for sixty working days and take all reasonable steps to ensure that the notices are not altered or defaced or covered by other material; and
- d) provide reasonable access to a representative of the Union from time to time during the aforesaid 60-day period to permit the Union to satisfy itself that the Employer is complying with the posting order.

69. The Board remains seized to resolve any dispute regarding compensation and the implementation of the Board's directions.

70. The Board has directed that all fourteen laid-off employees be reinstated and compensated for their losses. Only four of the fourteen persons called by the Union as witnesses were laid-off employees. In argument, counsel for the Employer submitted that the complaint should be dismissed as it relates to those laid-off grievors who did not testify. Counsel submitted that their failure to testify should lead the Board to conclude that they abandoned their claim and are not entitled to a remedy. As our remedial order discloses, we did not accept this argument.

71. In *Holiday Juice Ltd.*, [1984] OLRB Rep. Oct. 1449, the Board addressed an argument that only the grievor who testified should be awarded compensation. Although the basis for the

argument was different, the following comments of the Board are applicable to the argument made before us:

31. ... We further note that there is no obligation on a complainant or grievor to testify during the hearing of the merits of a section 89 complaint to which section 89(5) applies. Indeed, the Board is called upon from time to time to deal with cases of mass layoffs in which the calling of each individual grievor would result in unduly protracted proceedings and much unnecessary duplication of evidence. Similarly, in the present case, it was unnecessary for Union counsel to call Messrs. Durham, Nirwan, and Storr since evidence concerning pertinent facts such as their Union activities had already been placed before the Board through the testimony of other witnesses and the membership cards filed with the Board by the union. ...

72. We are satisfied that the evidence necessary to decide the issues before us and the facts relating to all fourteen laid-off employees were before the Board. It was unnecessary for the Union to call every grievor as a witness. We note that the Union, the party who had carriage of the complaint, sought a remedy on behalf of all fourteen laid-off employees. The Board is not prepared to conclude that the claims on behalf of ten laid-off employees were abandoned simply because they were not called by the Union to give evidence.

DECISION OF BOARD MEMBER G. O. SHAMANSKI;

1. I dissent.

2. Paul Craig's evidence in respect to his conversation with Wayne Harrison was refuted by Harrison. It is worthwhile to note that this was not the first time Harrison had been exposed to a union organizing campaign during his employment with Knob Hills. His evidence clearly established that in 1982 at the Knob Hill, Cherry Street store, there was a union organizing drive and since being transferred to the Oshawa store there has been another two or three organizing attempts. It was made clear to him by Mr. Stavro and Wood that he and all other management personnel were to stay clear of any union attempts to organize Knob Hill employees. He was told by correspondence and verbally that Knob Hill employees had the right to decide whether to have a union or not. He was aware that to contravene this direction would be grounds for discharge.

3. I have no compunction in accepting the totality of Wayne Harrison's evidence in preference of Paul Craig's evidence.

4. Rhonda Hasted's evidence in my view with respect to her conversation with Mike Nicolson, was not of the nature that could possibly be in contravention of sections 64 and 70, considering the fact that Nicolson denied having made the statements attributed to him by Hasted. On the basis of the evidence before this Board I prefer the evidence of Harrison and Nicholson to that of Hasted and Craig.

5. The company, as part of its compensation administrative policy, granted its employees wage increases annually. This is not an unusual practice. The granting of the March 29th increase to all Knob Hill employees was implemented at a time when there was no freeze in effect with respect to section 79. In my view, it is not within the purview of this Board to dictate when a corporation may grant its employees wage increases, other than that provided for with respect to section 79.

6. With the opening of their new facility in Weston, what better way was there to extend their gratitude for the success of the company to their employees than in granting a wage increase to all Knob Hill employees.

7. In my opinion, the company did not contravene sections 64 and 70 of the Act. It should be noted that this wage increase was extended to all employees and not restricted to the Oshawa facility. I am not persuaded that there was any anti-union consideration in respect to the wage increases granted in March 1986.

8. I cannot concur with the majority decision that the evidence of Derek Lacelle over that of Nicov is a more credible exposure of what transpired at this discussion. It is certainly within the right of an employer to warn employees of the perils they may encounter if they actively participate in organizing a union *on company time*, i.e. getting other employees to sign union cards on the premises during working hours. Actions of this nature are not in contravention of the Board's jurisprudence.

9. It would seem to me that Derek Lacelle's interest in this whole scenario is of the nature that would indicate he as well as other union witnesses had a great deal of coaching before giving evidence at this hearing. I am more inclined to give more weight to Nicov's evidence with respect to his discussion with Lacelle. Under the circumstances, *I would not have found* Knob Hill to have contravened sections 64, 66 and 70.

10. I am not persuaded by the evidence of Rhonda Hasted and Del Gobba with respect to an incident involving six cashiers that took place shortly following the lay-off in an area adjacent to the front office. These people were not asked to stay on after work by Cervini and he denied any attempt to intimidate them. Albeit Popowski, who it is alleged to have initiated this incident, was not called to give evidence with respect to the allegation.

11. Taking this alleged incident at its worst was not of the magnitude to warrant a declaration that it constituted an attempt by the employer to intimidate the cashiers and to interfere with the individual rights to form a trade union, contrary to sections 64, 65 and 70 of the Act.

12. With respect to the matter of lay-off of the fourteen employees during the third (3rd) week of March 1986. The company was opening a large facility in Weston. This new facility would embrace the focal point for the corporation distribution centre which was prior to its opening located in the Oshawa store. One does not have to be an organizational specialist to understand and come to the conclusion that a certain element of work would be reduced at the Oshawa distribution centre when this function was transferred to Weston. A reorganization of this nature is bound to create some upheaval in the work force, be it negative on one end of the scale and positive on the other end of the scale. This does not however translate into contraventions of sections 66 and 70 of the Act, and I would have accordingly ruled that sections 66 and 70 had not been contravened by the company.

13. It is certainly worth noting at this juncture that the Union had an organizing campaign in motion at the facility that stands to have its manning requirements reduced. The Union has also reached a point in time in their organizing drive where support for the Union cause has dried up. They now have reached a point in time where they have to weigh the prospects of success and failure in their organizing drive, and it is obvious from the barometer, i.e. the number of members signed for union membership and the number required, the drive is a failure.

14. The Union's own actions indicate its awareness of how close the final numbers would be. It took steps to have at least one supporter keep notes of incidents involving the Employer. Anyone reasonably familiar with labour relations knows that this is only done with the hopeful intent of bringing unfair labour practice complaints to buttress a shaky certification application. With such a situation, I wonder at how much effort is spent gathering information in support of a

section 8 complaint, that could be better spent trying to persuade employees to support the Union, as contemplated by the Preamble to our Act.

15. I am not at all influenced by the Union's evidence that the company violated any part or parts of the *Labour Relations Act*, with respect to the allegations re: File No. 0542-86-R and 0035-86-U. I would have dismissed the application.

16. I am however persuaded by the evidence given by Donna Baydak that the 156 signatures on the petition were the voluntary expression of the desires of these employees. I would have ordered a representation vote. To deny the employees the right to vote with respect to union representation in this case is in my opinion in direct conflict with the Ontario Labour Relations Act Preamble.

Appendix

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE HAVE ISSUED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH BOTH THE COMPANY AND THE UNION HAD THE OPPORTUNITY TO PRESENT EVIDENCE. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE ONTARIO LABOUR RELATIONS ACT AND HAS ORDERED US TO INFORM OUR EMPLOYEES OF THEIR RIGHTS.

THE ACT GIVES ALL EMPLOYEES THESE RIGHTS:

- TO ORGANIZE THEMSELVES;
- TO FORM, JOIN AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A TRADE UNION;
- TO ACT TOGETHER FOR COLLECTIVE BARGAINING;
- TO REFUSE TO DO ANY AND ALL OF THESE THINGS.

WE ASSURE ALL OF YOU THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES WITH THESE RIGHTS.

WE WILL NOT INTIMIDATE OR EXERT UNDUE INFLUENCE UPON YOU, WHETHER THROUGH MEETINGS, INDIVIDUAL CONVERSATIONS OR OTHERWISE, TO PREVENT YOU FROM EXERCISING YOUR RIGHT TO ASSOCIATE AND PARTICIPATE IN THE LAWFUL ACTIVITIES OF A UNION.

WE WILL NOT LAYOFF, DISCHARGE OR THREATEN TO LAY OFF OR DISCHARGE ANY EMPLOYEE BECAUSE OF THAT EMPLOYEE'S UNION ACTIVITY OR SYMPATHIES.

WE WILL NOT IN ANY OTHER MANNER INTERFERE WITH OR RESTRAIN OR COERCE OUR EMPLOYEES IN THE EXERCISE OF THEIR RIGHTS UNDER THE ACT.

WE WILL COMPLY WITH ALL DIRECTIONS OF THE ONTARIO LABOUR RELATIONS BOARD.

KNOB HILL FARMS LIMITED

PER: _____
(AUTHORISED REPRESENTATIVE)

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

2239-87-M Labourers' International Union of North America, Local 607, Applicant v. Ledcor Industries Ltd. and Castonguay Blasting Ltd., Respondents

Right of Access - Board declining to restrict access of the applicant to days when representatives of another union which had already been given access were not on site

BEFORE: *Robert Herman*, Vice-Chair, and Board Members *R. M. Sloan* and *J. Redshaw*.

DECISION OF THE BOARD; December 2, 1987

1. This is an application under section 11 of the *Labour Relations Act* for a direction giving the applicant access to property described as the Road Construction Site, Bending Lake Road, from 19.6 kilometers south of Highway 17, Southerly 11.3 kilometers (approximately 95 kilometers north of Atikokan at the end of Highway 807).

2. Leave is hereby given to the applicant to withdraw the application with respect to the respondent Castonguay Blasting Ltd. The applicant advised the Board that it understood that an application for certification had already been filed with respect to this respondent, and the terminal date of that application had already passed. The applicant further advised the Board that if the terminal date was extended in that application, the applicant might well be bringing another application under section 11 for access with respect to premises controlled by Castonguay.

3. The parties agreed that it was appropriate to direct access upon the following terms:

- (a) Before attempting to enter the camp, the applicant shall notify Jack Cameron or Geoff Akehurst or their designate not later than the close of business on the last business day prior to the day on which access is desired.
- (b) There shall be no solicitation of an employee during the employee's working hours.
- (c) While in the camp, the representatives of the applicant will obey all camp rules and regulations by which employees' conduct is governed including those relating to the use of safety equipment.
- (d) At the time of entering the camp the union representative(s) must notify the camp attendant or his/her designated representative if he or she is reasonably available.
- (e) Access on any given day shall be by no more than three of Phil Harris, Michael Reynolds, and/or any person or persons bearing the written authorization of one of the foregoing.
- (f) Access shall occur between the hours of 9:00 a.m. and 10:00 p.m.
- (g) This order shall expire on the terminal date fixed for any application for certification by the applicant with respect to employees of the respondent residing at the property in question.

4. We hereby direct that the respondent grant the applicant access on these terms.

5. In addition to the terms agreed upon between the parties which we have directed above, the respondent asked the Board to include one more restriction. In another decision of this Board, Board File No. 2051-87-M, concerning the same respondent employer but with the International Union of Operating Engineers, Local 793, as the applicant union, the Board directed access according to the terms we have set out above and which we have directed in the instant case. It is not disputed that the only building or structure large enough for the organizing unions, either Local 793 of the Operating Engineers or the applicant, to utilize as a meeting place is the Mess Hall used by employees. The respondent is concerned about potential problems that might arise should both unions be on the premises on the same day, and more particularly, seek to utilize the sole Mess Hall on the same day for meetings. Accordingly, the respondent asked that we restrict in some fashion the access by this applicant to those days on which Local 793 did not exercise its access rights.

6. After considering the full submissions of the parties on this issue, the Board declined to restrict access as requested by the respondent employer. To restrict access of the applicant as requested to those days when representatives of the Operating Engineers, Local 793 were not on site, would be to give an advantage for organizing purposes to Local 793. The direction issued with respect to its right of access contained no such requirement, and any direction this panel might issue would only be legally binding on this applicant, Labourers' Local 607. Local 793 would therefore have a direction which placed no restrictions on its ability to have access to the premises on any day, while restricting access of this applicant to those days when Local 793 chose not to utilize its access rights.

7. Quite apart from the effect that such a direction might have upon the relative organizing abilities of the two unions, we can see no reason why both unions should not be entitled to access to the camp on the same day, if they should so desire, and consistent with the terms of our direction outlined above. The fact that employees may be subjected to organizers from competing unions on the same day is a matter that employees can readily deal with themselves. Employees are in no way forced to listen to particular organizers, and the Board only ensures that they have the opportunity to listen should they so desire.

8. It is to be hoped that the competing unions will co-ordinate their organizing efforts so that problems do not arise with respect to the use of the Mess Hall premises. We see no problem with both unions using the Mess Hall on the same day, but at different times. Equally, even should they seek to use the Mess Hall premises at the same time on the same day, it may well be that no problems occur. We offer no comments on whether the two unions are entitled as of right to use the Mess Hall premises at the same time, only that we are not prepared to preclude them at this stage from so doing.

9. Should problems arise with respect to the use of the Mess Hall by both unions at the same time on the same day, then either party shall be free to request that this matter be brought back on for hearing. The party so requesting is hereby directed to notify Local 793 of the Operating Engineers of the request that this matter be re-listed for hearing. Additionally, should the matter be re-listed on this basis, notice of hearing of the next hearing date is hereby directed to be given to Local 793 of the Operating Engineers. Any such notice should indicate that in addition to all other matters to be dealt with at the hearing, the Board will deal with the issue of whether Local 793 should be added as a respondent to these proceedings. In this fashion, with the respondent employer and both competing unions before a panel of the Board, the Board will be able to deal with any problems with respect to access.

10. In the interim however, access is directed as noted in the terms set out above and

agreed to by the parties. Those terms are continued in effect until the Board directs otherwise, and are not to be suspended by the listing of this matter for further hearing.

11. This panel is not seized, and the matter can be re-listed before a differently constituted panel.

0284-87-M Lumber and Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, and Labourers International Union of North America, Ontario Provincial District Council, and Labourers International Union of North America, Local 607, and United Brotherhood of Carpenters and Joiners of America, Ontario Provincial Council, and Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, and International Union of Operating Engineers, Local 793, and The Ontario General Contractors Association, and Construction Association of Thunder Bay Inc.

Construction Industry - Reference - Whether Minister should issue new designation orders and/or amend existing designation orders to permit union local to lawfully represent workers in the ICI sector of the construction industry

BEFORE: *Ian C. Springate*, Vice-Chair, and Board Members *M. Eayrs* and *N. Wilson*.

APPEARANCES: *L. C. Arnold* and *Fred Miron* for Lumber and Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America; *S. B. D. Wahl*, *T. Connolly* and *P. Little* for Labourers International Union of North America, Ontario Provincial District Council and Labourers International Union of North America, Local 607; *N. L. Jesin* and *Robert Reid* for United Brotherhood of Carpenters and Joiners of America, Ontario Provincial Council; *S. B. D. Wahl* and *J. Zanussi* for Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen; *Jack J. Slaughter* for International Union of Operating Engineers, Local 793, *J. Liberman* and *J. Thompson* for The Ontario General Contractors Association; *J. Liberman* and *M. MacLeay* for Construction Association of Thunder Bay Inc.

DECISION OF THE BOARD; December 31, 1987

1. This is a referral from the Minister in which he requests the Board's advice concerning the possible issuance of new designation orders under the provincial bargaining sections of the *Labour Relations Act* and/or amendments to existing designation orders.
2. These proceedings primarily concern the status of Lumber and Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America ("Local 2693"). Local 2693 is headquartered in Thunder Bay. It represents employees in the three districts of North Western Ontario, namely the districts of Thunder Bay, Kenora (including the Patricia portion) and Rainy River. As indicated by its full name, Local 2693 is a local of The United Brotherhood of Carpenters and Joiners of America (the "Carpenters Union").
3. Most Carpenters Union locals in Ontario have as members carpenters, millwrights and their apprentices employed in the construction industry. Local 2693 is one of two "Lumber and

Sawmill Workers" locals of the Carpenters Union in Ontario, the other being Local 2995 in Kapuskasing. Both of these locals represent sizeable numbers of employees engaged in woods operations and related industries. Unlike Local 2995, however, Local 2693 also represents employees in the construction industry.

4. Local 2693 has had a presence in the construction industry in North Western Ontario since the 1950's. Its entry into this field appears to have been due, in part, to the fact that many woods operations were conducted only during the winter months. Many members of Local 2693 who worked in the woods during the winter turned to the construction industry for summer employment. Another contributing factor was the relative inactivity in North Western Ontario of a number of the traditional building trades unions.

5. From the beginning of its involvement in the construction industry, Local 2693 was particularly active in the representation of construction labourers. This brought the local into direct conflict with the Labourers International Union of North America and its Local 607 ("Labourers Local 607") which is also based in Thunder Bay. Local 2693 initially established its pre-eminence as the representative of construction labourers in North Western Ontario in 1957 when the Board struck down as unlawful a voluntary recognition agreement entered into between Labourers Local 607 and The Lakehead Builders' Exchange and then certified Local 2693 as the bargaining agent for the employees of a number of employers who belonged to the Builders Exchange.

6. Local 2693 has never been recognized by the Board as a union entitled to be certified for construction industry bargaining units restricted only to a single trade or classification. The Board initially certified the local for "all employee" bargaining units. In accordance with a general change in the Board's practice of describing construction bargaining units for industrial unions, however, from the mid-1960's Local 2693 bargaining units were described in terms of all unrepresented trades or classifications at work on the date it filed its application for certification. In many instances the only unrepresented trade was construction labourers, resulting in the Board issuing certificates restricted to construction labourers. In negotiations with The Lakehead Builders' Exchange, and its successor, the Construction Association of Thunder Bay, Local 2693 entered into collective agreements described so as to cover "all employees" except those "bound by subsisting collective agreements". Similar language was utilized in collective agreements entered into with employers who did not belong to the construction association.

7. It appears that throughout the 1960's Local 2693 actively represented employees belonging to a number of different trades. Increasingly, however, the local limited the scope of its representation to construction labourers. With one major exception, it did not object to attempts by the traditional building trades unions to acquire bargaining rights for their respective trades, even when the employees involved were already covered by a Local 2693 "all employee" collective agreement. The exception was with respect to construction labourers. Local 2693 actively resisted numerous attempts by Labourers Local 607 to displace it as the bargaining agent for construction labourers. In consequence of these developments, Local 2693 for construction industry purposes became a trade union that primarily represented construction labourers. It did continue to represent some employees in other trades, notably truck drivers and equipment operators, but not in any meaningful numbers.

8. Local 2693 does have a fairly recent history of representing persons performing cement finishing work. At one time, cement finishing was generally regarded as part of the work of a cement mason. Traditionally, cement masons were recognized as a specialized trade represented by the Operative Plasterers and Cement Masons International Association of the United States and Canada. In the late 1960's, however, cement finishing work came to increasingly be performed

by construction labourers trained in the work. The situation became even more confused in the 1970's when certain locals of the Labourers Union acquired formal bargaining rights for units of cement masons. In similar fashion to the Labourers' Union, Local 2693 also began to represent employees performing cement finishing work. It referred to the individuals in question as "cement finishers". Local 2693 signed a number of separate collective agreements for cement finishers with the Cement Finishers' Division of the Construction Association of Thunder Bay. The last such agreement expired in 1982. It was not renewed because most of the bargaining rights involved had successfully been "raided" by Labourers Local 607. At the time of the hearing into these proceedings, Local 2693 continued to have some 15 to 20 "cement finishers" as members, of whom 6 or 8 were actively working. These members were employed pursuant to the terms of the same collective agreements that covered construction labourers.

9. As already indicated, since the late 1950's Local 2693 and Labourers Local 607 have been active rivals. Initially, Local 2693 was the more successful of the two. Over the years, however, Labourers Local 607 acquired sufficient members and bargaining rights, often at the expense of Local 2693, to gain the ascendancy. Notwithstanding the growth of Labourers Local 607, Local 2693 continued to retain a meaningful presence in North Western Ontario. At the time of the hearing into these proceedings some 20 employers apparently bound to collective agreements with Local 2693 were engaged on projects in North Western Ontario employing approximately 75 to 80 of the local's members.

10. In 1978 the *Labour Relations Act* was amended to introduce a system of provincial bargaining in the industrial, commercial and institutional ("ICI") sector of the construction industry. The amendments to the Act followed the release of a report prepared by Mr. Don Franks acting as a one-person industrial inquiry commission into bargaining patterns in the construction industry. In his report, Mr. Franks recommended that local negotiations be consolidated at the provincial level through employer and employee bargaining agencies. An important cornerstone of the scheme he recommended was that only provincial agreements entered into by the appropriate employer and employee bargaining agencies be accorded legal recognition, and that any other agreements be of no force or effect.

11. The relevant sections of the Act relating to provincial bargaining are set out below:

137.-(1) In this section and in sections 135 and 138 to 151,

- (a) "affiliated bargaining agent" means a bargaining agent that, according to established trade union practice in the construction industry, represents employees who commonly bargain separately and apart from other employees and is subordinate or directly related to, or is, a provincial, national or international trade union, and includes an employee bargaining agency.
- (b) "bargaining", except when used in reference to an affiliated bargaining agent, means province-wide, multi-employer bargaining in the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e);
- (c) "employee bargaining agency" means an organization of affiliated bargaining agents that are subordinate or directly related to the same provincial, national or international trade union, and that may include the parent or related provincial, national or international trade union, formed for purposes that include the representation of affiliated bargaining agents in bargaining and which may be a single provincial, national or international trade union;
- (d) "employer bargaining agency" means an employers' organization or group

of employers' organizations formed for purposes that include the representation of employers in bargaining;

- (e) "provincial agreement" means an agreement in writing covering the whole of the Province of Ontario between a designated or accredited employer bargaining agency that represents employers, on the one hand, and a designated or certified employee bargaining agency that represents affiliated bargaining agents, on the other hand, containing provisions representing terms or conditions of employment or the rights, privileges or duties of the employer bargaining agency, the employers represented by the employer bargaining agency and for whose employees the affiliated bargaining agents hold bargaining rights, the affiliated bargaining agents represented by the employee bargaining agency, or the employees represented by the affiliated bargaining agents and employed in the industrial, commercial and institutional sector of the construction industry referred to in clause 117(3).

(2) Where an employer is represented by a designated or accredited employer bargaining agency, the employer shall be deemed to have recognized all of the affiliated bargaining agents represented by a designated or certified employee bargaining agency that bargains with the employer bargaining agency as the bargaining agents for the purpose of collective bargaining in their respective geographic jurisdictions in respect of the employees of the employer employed in the industrial, commercial or institutional sector of the construction industry referred to in clause 117(e), except those employees for whom a trade union other than one of the affiliated bargaining agents holds bargaining rights.

139.-(1) The Minister may, upon such terms and conditions as the Minister considers appropriate,

- (a) designate employee bargaining agencies to represent in bargaining provincial units of affiliated bargaining agents, and describe those provincial units;
- (b) notwithstanding an accreditation of an employers' organization as the bargaining agent of employers, designate employer bargaining agencies to represent in bargaining provincial units of employers for whose employees affiliated bargaining agents hold bargaining rights, and describe those provincial units.

(2) Where affiliated bargaining agents that are subordinate or directly related to different provincial, national or international trade unions bargain as a council of trade unions with a single employer bargaining agency for a province-wide collective agreement, the Minister may exclude such bargaining relationships from the designations made under subsection (1), and subsection 146(2) shall not apply to such exclusion.

• • •

(4) The Minister may refer to the Board any question that arises concerning a designation, or any terms or conditions therein, and the Board shall report to the Minister its decision on the question.

• • •

142. Where an employee bargaining agency has been designated under section 139 or certified under section 140 to represent a provincial unit of affiliated bargaining agents, all rights, duties and obligations under this Act of the affiliated bargaining agents for which it bargains shall vest in the employee bargaining agency, but only for the purpose of conducting bargaining and, subject to the ratification procedures of the employee bargaining agency, concluding a provincial agreement.

• • •

146.-(1) An employee bargaining agency and an employer bargaining agency shall make only one provincial agreement for each provincial unit that it represents.

(2) On and after the 30th day of April, 1978 and subject to sections 139 and 145, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with subsection (1) is null and void.

12. In rather simplified terms, the scheme provided for under the Act is one where locals of the same building trades union are each an "affiliated bargaining agent" as that term is defined in section 137(1)(a). To represent these affiliated bargaining agents in negotiations, the Minister "designates" an "employee bargaining agency" as defined by section 137(1)(c). Each employee bargaining agency bargains with a counterpart on the employer side, namely a designated "employer bargaining agency". These negotiations can produce only a single province-wide agreement, referred to as a "provincial agreement". In line with Mr. Franks' recommendation against allowing any agreement other than a provincial agreement, section 146(2) prohibits the negotiation of any agreement affecting employees represented by an affiliated bargaining agent that is not a provincial agreement, and stipulates that any such agreement is null and void. The language utilized in section 146(2) is clear and unambiguous. The single exception provided for in the Act is with respect to bargaining relationships involving councils of unions comprised of locals of different building trades unions. The Minister may exclude such bargaining relationships from the designations, and when he does so, the prohibition against any agreement other than a provincial agreement does not apply.

13. Provincial bargaining in the ICI sector is structured essentially on a multi-employer single trade basis. There are, however, a number of departures from the principle of single-trade bargaining. These exceptions reflect the fact that at the time provincial bargaining was introduced, certain construction trade unions represented ICI employees outside of their "normal" trade or classification. For example, the Labourers Union represented units of plasterers as well as units of employees engaged in restoration and waterproofing work, often referred to as "steeplejacks", both of which groups had traditionally been represented by the Operative Plasterers and Cement Masons International Association of the United States and Canada. Because of this, the designation for the labourers employee bargaining agency covers not only labourers, but the other two classifications as well. Similarly, in recognition of the fact that the International Union of Bricklayers and Allied Craftsmen has traditionally represented plasterers in certain parts of the province, the bricklayers employee bargaining agency designation refers to plasterers as well as to bricklayers and stonemasons.

14. When the scheme of provincial bargaining was introduced into the Act, no special provision was made to deal with the status of Local 2693. The Carpenters Union, together with a council of its Ontario locals, which did not include Local 2693, were designated as the employee bargaining agency for carpenters and carpenters' apprentices. A similar designation was issued for millwrights and millwrights' apprentices. These designations empowered the relevant employee bargaining agencies to represent in bargaining provincial units of affiliated bargaining agents, and listed the affiliated bargaining agents in question. In that Local 2693 did not represent carpenters or millwrights it was not listed on either designation. Accordingly, Local 2693 became a local of the Carpenters Union not represented by a designated employee bargaining agency. Notwithstanding this fact, because of the provisions of section 146(2) of the Act, if the local came within the definition of an affiliated bargaining agent, as that term is defined in section 137(1)(a), it would still be affected by the provincial bargaining sections of the Act. According to counsel for Local 2693,

at about the time the amendments to the Act were being considered, the Local raised this matter with a representative of the then-Minister and was advised that the Local would not be covered by provincial bargaining. Presumably this advice was based on the understanding that Local 2693 bargained for a number of different classifications of employees, as opposed to a single group of employees who commonly bargain separate and apart from other employees, and accordingly did not fit the definition of an affiliated bargaining agent. Given Local 2693's role in representing construction labourers, it appears that the advice given to the local may not have been accurate. If in fact the advice from the Minister's representative was correct at the time, it would only remain so provided Local 2693 did not subsequently come within the definition of an affiliated bargaining agent.

15. Section 146(2) prohibits an affiliated bargaining agent from entering into a collective agreement that is not a provincial agreement. The wording of this section has led the Board to conclude that a local of a building trades union which meets the definition of an affiliated bargaining agent cannot enter into a valid collective agreement for a trade or classification not referred to in the relevant employee bargaining agency designation. Following from this conclusion, the Board has on a number of occasions dismissed applications for certification by building trades unions "across craft lines". Accordingly, bargaining rights for an unrepresented unit of employees in the ICI sector can only be obtained by the building trades union designated to represent the trade or classification involved, (i.e., bricklayers can only be represented by the Bricklayers Union), or by a non-building trades union outside the scheme of provincial bargaining.

16. The leading case concerning attempts to organize across craft lines was *Manacon Construction Limited*, [1983] OLRB Rep. March 407, application for reconsideration dismissed [1983] OLRB Rep. July 1104. The *Manacon* case arose out of the chartering of Local 1030 by the Carpenters Union to represent, among others, labourers employed in the ICI sector in the Ottawa area. Local 1030 applied to the Board to be certified to represent an ICI unit of construction labourers employed by Manacon Construction Limited. The application was challenged on the basis that Local 1030 was a carpenters affiliated bargaining agent and accordingly could not represent a unit of construction labourers. Because Local 1030 was a newly chartered local without a practice of its own, the Board looked to the general practice of the Carpenters Union in determining the local's status. That general practice was to represent units of carpenters and millwrights, two trades who according to established trade union practice generally bargain separate and apart from other employees. On this basis, the Board concluded that Local 1030 was an affiliated bargaining agent and accordingly barred by section 146(2) from entering into a collective agreement covering construction labourers employed in the ICI sector. In the result, the Board declined to certify Local 1030. It is of some interest that in the *Manacon* case, Carpenters Local 1030 claimed that its status was similar to that of Local 2693. In response, the Board commented that the collective agreement between Local 2693 and the Construction Association of Thunder Bay purported to cover a number of classifications, not simply construction labourers, and hence Local 2693, unlike Local 1030, appeared not to come within the definition of an affiliated bargaining agent.

17. In its reconsideration decision in the *Manacon* case, the Board commented on the apparent purpose of the Carpenters Union in chartering Local 1030, namely to permit the union to enjoy the benefits of provincial bargaining while at the same time utilizing Local 1030 to get around some of the regime's strictures. The Board viewed this attempt as one which, if successful, would generate major instability in collective bargaining, reasoning as follows:

30. The Board is constrained not to conclude this decision without commenting on the obvious purpose of the chartering of Local 1030 as a new local. As the Board has already noted in paragraph 17 above, the province-wide bargaining part of the Act has brought to those trade unions which are part of that bargaining regime new benefits and new limitations. What the United

Brotherhood is attempting to do is to enjoy all of the benefits of province-wide bargaining, while at the same time by its chartering of Local 1030, seeking to devise a vehicle which would enable the United Brotherhood to get outside of some of the regime's strictures, such as those imposed by sections 144(1) and 146(2). In other words, it is seeking to employ Local 1030 to enable the United Brotherhood to escape the reach and purpose of the province-wide bargaining part of the Act. The fact that there are already two locals of the United Brotherhood with geographic jurisdiction in the Ottawa area where Local 1030 is based serves to heighten the subterfuge at play here. The province-wide bargaining part of the Act was added to it by *The Labour Relations Amendments Act, 1977*, S.O. c.31 ("Bill 22"). The legislative purpose of that amendment was first to recognize existing bargaining rights and patterns in the ICI sector and then to structure around them a province-wide bargaining regime, the objective of which was to stabilize the collective bargaining process in this significant sector of the construction industry. It is wholly inconsistent with that objective and clearly not contemplated by the Legislature that these provisions be interpreted in a way which would generate major and fundamental instability in the collective bargaining process. In not permitting the United Brotherhood to escape the reach and purpose of the provincial bargaining regime by the technique of chartering a local which appears to satisfy the form of the province-wide bargaining part of the Act without due regard for its purpose, the Board is giving primacy to substance over form.

18. The status of Local 2693 under the scheme of provincial bargaining was directly raised for the first time in *EKT Industries Inc.*, [1987] OLRB Rep. March 352. In that case, both Local 2693 and Labourers Local 607 claimed bargaining rights for the same unit of ICI construction labourers. As part of its case, Labourers Local 607 contended that Local 2693 was an affiliated bargaining agent and accordingly ineligible to enter into a collective agreement covering employees in the ICI sector. In a unanimous decision, the Board panel concluded that whatever its practice may have been in the past, Local 2693 was now a union that according to established practice bargained solely and separately for construction labourers apart from other employees. Given the local's relationship with the Carpenters Union, the Board further found that the local came within the definition of an affiliated bargaining agent. In consequence of this finding, the Board concluded that Local 2693 could not lawfully enter into an ICI collective agreement that was not a provincial agreement. The Board further concluded that Local 2693 could not lawfully represent construction labourers employed in the ICI sector. The reasoning of the Board is found in the following excerpts from the *EKT Industries* decision:

34. It follows from the above comments referring to "commonly bargain separately and apart from other employees" that a trade union that is an industrial union (in the sense that it bargains for all employees of an employer) can never be an affiliated bargaining agent within the meaning of section 137(1)(a) of the Act. Thus, when Lumber and Sawmill Workers Union, Local 2693 was an industrial union in construction, bargaining for all employees, it was not an affiliated bargaining agent. The problem is that regardless of what their collective agreement says and as a consequence of a number of years of representing only construction labourers, it cannot now be said that Lumber and Sawmill Workers Union, Local 2693 in Northwestern Ontario represents employees other than construction labourers. Indeed, when Local 2693 bargains it bargains solely and separately for construction labourers with a group of employers. For example, although it may appear on the face of the bargaining unit that carpenters not represented by Carpenters Local 1669 in the employ of an employer bound by the standard collective agreement with Local 2693 are bound to that agreement, in no case has Local 2693 bargained with that employer for carpenters. Indeed, for any trade group other than construction labourers. In these circumstances, therefore, we are compelled to find that Local 2693 falls within the meaning of "affiliated bargaining agent" as set out in section 137(1)(a) of the Act. In sum, according to its established practice in its area it bargains solely and separately for construction labourers apart from any other employees and it is related to the United Brotherhood of Carpenters and Joiners of America and Carpenters Local 1669.

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38. What then is the situation of Local 2693? On the one hand it is not part of an employee bargaining agency. On the other hand we have found that it is an affiliated bargaining agent within

the meaning of section 137(1)(a). Any attempt by Local 2693 to bargain contrary to the scope of subsection (2) of section 146 would be unlawful if that section applies to Local 2693. In our view the key words to the section are as emphasized below:

(2) On and after the 30th day of April, 1978 and subject to sections 139 and 145, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement *affecting employees represented by affiliated bargaining agents* other than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with subsection (1) is null and void.

[emphasis added]

In our view the construction labourers represented by Local 2693 are employees represented by an affiliated bargaining agent and they are not represented under the aegis of the provincial agreement as required by section 146(1) insofar as they relate to the industrial, commercial and institutional sector of the construction industry.

...

41. What then is the effect of the prohibition of section 146(2)? In our view it means that Local 2693 as an affiliated bargaining agent cannot lawfully represent the construction labourers of the respondent E K T Industries insofar as those construction labourers are employed in the industrial, commercial and institutional sector of the construction industry. On the other hand, no such limitation applies to Labourers Local 607. It is our view that the Board ought not to provide bargaining rights for Local 2693 through either section 63 or section 1(4) of the Act which would lead to collective agreements which would violate the prohibition of section 146(2) of the Act. In our view, therefore, the claim by Lumber and Sawmill Workers Union, Local 2693 for bargaining rights with respect to E K T with respect to employees in the industrial, commercial and institutional sector should be dismissed and the claim by Labourers Local 607 ought to be allowed.

19. In a subsequent proceeding in File No. 0373-87-U, filed by the General Contractors Division of the Construction Association of Thunder Bay, the Board concluded that the finding in *EKT Industries* that Local 2693 is an affiliated bargaining agent, and thus unable to lawfully represent construction labourers in the ICI sector, was a decision *in rem*. The Board further declared that in the ICI sector the collective agreement between the General Contractors Division of the Construction Association of Thunder Bay and Local 2693 was an unlawful agreement contrary to section 146 and of no force and effect.

20. Following the *EKT Industries* decision, Local 2693 requested that the Minister issue the necessary new designations to preserve its bargaining rights. The Minister referred the issue to the Board for its opinion, thus giving rise to the instant proceedings.

21. Local 2693 contends that the Board should advise the Minister that it is not, in fact, an affiliated bargaining agent and accordingly there is no need to make any changes to the existing designations. This contention is necessarily based on the proposition that the *EKT Industries* case was wrongly decided. The difficulty with this contention is that the *EKT Industries* case is a decision of record of the Board. We have no reason to believe that other panels of the Board will decline to follow its reasoning. In these circumstances, we are not in a position to advise the Minister that his decision in this matter can reasonably be premised on the basis that *EKT Industries* was wrongly decided. We can, however, advise the Minister that Local 2693 has requested that the Board reconsider its decision in *EKT Industries*. If in the course of such a reconsideration the Board should decide that Local 2693 is not an affiliated bargaining agent, then presumably the situ-

ation will revert to what it was prior to the *EKT Industries* decision, and Local 2693 will no longer be seeking the issuance of new designation orders.

22. Local 2693 proposes that it be exempted from the scheme of provincial bargaining in the same way the Minister has exempted Labourers Union Locals 183, 1081 and 493 with respect to concrete forming work. The only provision of the Act which permits such an exclusion is section 139(2), which provides as follows:

(2) Where affiliated bargaining agents that are subordinate or directly related to different provincial, national or international trade unions bargain as a council of trade unions with a single employer bargaining agency for a province-wide collective agreement, the Minister may exclude such bargaining relationships from the designations made under subsection (1), and subsection 146(2) shall not apply to such exclusion.

Pursuant to this section, a bargaining relationship involving a council of trade unions comprised of Labourers Union Local 183 and the International Union of Operating Engineers has been excluded from the Labourers designation. Because of the specific wording of section 139(2), the prohibition against entering into a collective agreement other than a provincial agreement does not apply to the council. Local 2693 is not, however, part of a council of trade unions which would qualify for a similar exemption under section 139(2). In the Labourers designation the Minister does note that with respect to certain bargaining relationships covering employees engaged in concrete forming, Labourers Locals 183, 493 and 1081 represent employees who do not commonly bargain separate and apart from other employees and according with respect to such bargaining rights the locals are not affiliated bargaining agents. In the context of these proceedings, there is no need to address the accuracy or effect of this statement in the designation. Suffice it to say that Local 2693 has been found to be an affiliated bargaining agent because it does represent employees who commonly bargain separately and apart from other employees. The Act contains no mechanism for exempting an affiliated bargaining agent that is not part of a council of trade unions from the prohibition against entering into an agreement other than a provincial agreement.

23. As an alternative method of preserving Local 2693's ICI bargaining rights, the Carpenters Union has proposed that existing designation orders be amended so as to expressly exclude from their scope employees represented by Local 2693. While such an amendment to the carpenters employee bargaining agency designation would serve to stress the fact that Local 2693 is not represented in bargaining by the carpenters employee bargaining agency, it would not legally change the situation regarding Local 2693. The local has been held to be an affiliated bargaining agent. As an affiliated bargaining agent, it is prohibited from entering into an agreement that is not a provincial agreement. An amendment to the Labourers employee bargaining agency designation so as to exclude from its scope employees represented by Local 2693 would likewise not be of any assistance to the local.

24. Local 2693 proposes that the Minister designate it, alone or with the Carpenters Union, as a separate employee bargaining agency representing construction labourers and certain other employee classifications, and that such a designation be restricted to North Western Ontario. The difficulty with this proposition is that the Minister is only empowered by section 139 to designate employee bargaining agencies to represent "provincial units" of affiliated bargaining agents. Logically a "provincial unit" must encompass all of the Province of Ontario. It follows that it is not within the Minister's authority to designate Local 2693 as an employee bargaining agency only with respect to North Western Ontario.

25. We have set out above the reasons why we believe certain proposals put forward by the parties either could not lawfully be implemented by the Minister, or if implemented would not

have any meaningful effect. There appears to be, however, a number of other options open to the Minister. Unfortunately, none of these is the obviously "correct" one to adopt. Each can be viewed as having certain advantages as well as disadvantages. Complicating the situation is the fact that the parties to these proceedings have conflicting interests. What some parties view as an advantage, others see as a disadvantage, and vice versa.

26. Before reviewing the alternatives open to the Minister, we believe it useful to first discuss in a general way some of the relevant considerations. One is the fact that for some 30 years Local 2693 has been representing construction employees, notably construction labourers, in North Western Ontario. Further, Local 2693 is apparently the only union whose existing bargaining rights have effectively been nullified by the scheme of provincial bargaining. As indicated in the *Manacon* case, all unions bound by the scheme of provincial bargaining are now unable to represent classifications of employees not referred to in their designation orders. With the exception of Local 2693, however, trade unions with a pre-existing practice of representing a particular classification or trade had those trades or classifications referred to in their designation orders.

27. Another consideration is the instability that can result when rival trade unions represent the same employee classification or trade. Competition between unions can seriously impact on the collective bargaining process. Depending on the state of the economy and employment levels, competing unions may seek to attract employee support by outdoing each other in the negotiation of wages and benefits. Alternatively, one union may seek to negotiate lower wage rates and benefits than the other so as to enable the employers with which it has bargaining relationships to be more competitive. Conduct of this sort is of particular concern in the ICI sector, given that provincial bargaining was introduced so as to bring greater stability to this sector of the construction industry.

28. As noted above, there do exist a number of employee classifications and trades for which more than one employee bargaining agency has been designated. To date, this situation has not resulted in any serious disruption to the scheme of provincial bargaining. This appears to be due to several factors, including the relatively small total number of employees in certain classifications, and, in other situations, the limited number of employees negotiated for by one of the bargaining agencies. Perhaps of greater importance, however, is a general acceptance of the status quo on the part of the unions involved. Unlike these other situations, if the carpenters and labourers unions are provided with an opportunity to become more active rivals than they are already, there is a real possibility they will avail themselves of the opportunity. As noted above, Local 2693 and Labourers Local 607 have long been rivals with respect to the representation of construction labourers. There is no reason to suspect that if Local 2693 is again empowered to represent ICI construction labourers, this rivalry will not continue. Further, if designations are amended so as to allow the Carpenters International and/or other locals of the carpenters union to represent ICI construction labourers outside of North Western Ontario, it is quite possible they will seek to do so. It will be recalled that the Carpenters Union chartered Local 1030 in Ottawa to do just that. The Carpenters Union might well view attempts on its part to represent construction labourers outside North Western Ontario as being comparable with the current practice of the Labourers Union in representing carpenters engaged in house framing as well as substantial numbers of employees engaged in carpentry work in the concrete forming field.

29. One option open to the Minister is to amend the carpenters designation so as to list Local 2693 as one of the affiliated bargaining agents represented by the carpenters employee bargaining agency, and at the same time extend the scope of the designation to cover not only carpenters, but construction labourers as well, including those engaged in cement finishing. Such amendments would serve to protect Local 2693's bargaining rights in much the same manner that the

Labourers Union's bargaining rights for classifications other than construction labourers have been preserved in its designation. A major difference, however, is the possibility of serious conflicts developing across the province as various locals of the Carpenters Union, including Local 1030, seek to acquire bargaining rights for ICI construction labourers, including bargaining rights already held by the Labourers Union. Should this occur, the system of provincial bargaining with respect to construction labourers would be severely undermined.

30. Another possible alternative, one not referred to by any of the parties at the hearing, but which nevertheless may be worthy of consideration, involves a variation of the approach set out in the preceding paragraph. It entails an amendment to the carpenters designations so as to refer to Local 2693 in the designation orders as one of the locals represented by the Carpenters employee bargaining agency, as well as an expansion of the employee bargaining agency's authority to bargain so as to cover not only carpenters and carpenter apprentices, but construction labourers as well, including those engaged in cement finishing. The reference to construction labourers, however, would be restricted to those employed in the Districts of Kenora, Rainy River and Thunder Bay. The result would be an employee bargaining agency designation that covers a provincial unit of affiliated bargaining agents, albeit with respect to one of the classifications listed in the designation order it is limited to a particular part of the province. The relevant provincial agreement would be the carpenters provincial agreement with whatever special terms might be agreed to with respect to construction labourers in North Western Ontario. Such a result is not one sought by Local 2693, for under this arrangement the local would not be able to bargain its own local agreement. It is, however, a result that would enable Local 2693 to continue as the local bargaining agent for construction labourers.

31. The language of section 144(1) of the Act, wherein it provides that a bargaining unit determined by the Board in a certification application shall include "all employees who would be bound by a provincial agreement", does give rise to one potential problem with respect to the approach set out above. On one possible interpretation, this language would require that every time a local of the Carpenters Union applied to be certified to represent carpenters, the appropriate unit would also have to include construction labourers in the employ of the employer in North Western Ontario. Conversely, every unit of construction labourers for which Local 2693 sought bargaining rights would also have to include carpenters in the employ of the employer throughout the province. The adoption of such an interpretation could create serious organizing problems for all locals of the Carpenters Union, including Local 2693, as well as possible difficulties for Labourers Local 607 when seeking to "raid" Local 2693 bargaining rights. We raise these concerns out of an abundance of caution. It is far from clear that such difficulties would in fact arise. When considering applications for certification the Board has, to date, generally defined ICI bargaining units by reference to a single classification or trade, and has not described the unit so as to encompass all of the classifications or trades referred to in the relevant designation orders. For example, when the Labourers Union has applied to be certified to represent units of construction labourers, the Board has generally described the bargaining unit solely by reference to construction labourers without also including in the unit other classifications referred to in the labourers designation order. This approach reflects the historical pattern in this province by which construction trade unions have generally obtained bargaining rights for one trade or classification at a time. It is, however, an approach that has been adopted by the Board without being seriously questioned or challenged. Should the Minister adopt the option set forth in the proceeding paragraph, it is quite possible that the Board's existing practice on point will be challenged. Because of this, prior to adopting this option the Minister may desire to ascertain whether the parties to the carpenter designations, particularly the Carpenters Union, are agreeable to this manner of proceeding.

32. Another alternative open to the Minister is to designate Local 2693, alone or together

with the Carpenters Union, as a separate employee bargaining agency representing construction labourers, including those engaged in cement finishing, on a province-wide basis. If the Minister selects this option, the local, perhaps in conjunction with the Carpenters Union, would be able to enter into a lawful provincial agreement covering construction labourers. Such a designation would preserve Local 2693's long-established position in North Western Ontario as a union that represents construction labourers. Another result, however, is that the local would be able to represent construction labourers employed in the ICI sector outside of North Western Ontario, in much the same way as Carpenters Local 1030 sought to do in the Ottawa area. Even if Local 2693 were not to take any active steps to extend its activities outside of North Western Ontario, such a result might well occur as a matter of law. Section 137(2) would extend Local 2693's ICI bargaining rights province-wide. Accordingly, for any employers that also operate in other parts of Ontario, or local employers who expand their operations outside of North Western Ontario, Local 2693's bargaining rights would also be extended. If this option is the one selected, serious consideration should be given to departing from the standard practice of listing the relevant international union as one of the affiliated bargaining agents represented by the bargaining agency. To follow the general practice in the instant case would presumably enable the Carpenters International to actively acquire bargaining rights for ICI labourers anywhere in the province.

33. There is one final option open to the Minister. That is not to make any changes to the carpenters designation orders or to issue any new designation orders. The effect of this option would be to ensure that Local 2693 cannot represent construction labourers in the ICI sector. This would end the rivalry that has gone on for many years between Local 2693 and Labourers Local 607. In addition, it would not involve any of the disadvantages associated with the other options discussed above. It would also, however, mean a permanent end to Local 2693's thirty-year practice of representing construction labourers in North Western Ontario.

34. We would address one further matter, namely the current legal status of Local 2693's bargaining rights. As noted above, in previous proceedings the Board determined that as the situation now stands, Local 2693 cannot enter into valid collective agreements on behalf of construction labourers in the ICI sector. From this, the Board concluded that the Local could not lawfully represent such employees. There is no provision in the Act, however, which expressly served to extinguish Local 2693's bargaining rights. An arguable case could be made that should the Minister adopt any of the options available to him, other than that of accepting the status quo, Local 2693's bargaining rights would once again be given meaning in that the employees it represents could now be covered by a provincial agreement. So as to ensure such a result, however, the Minister may wish to expressly make any new designation orders, or amendments to existing designation orders, retroactive to a point in time prior to the Board's decision in *EKT Industries*.

35. The decision as to which option to select is one the Act assigns to the Minister. To assist the Minister in making his decision, we have reviewed the factual and legal backgrounds to this matter. We have identified those proposals put forward by the parties which either cannot be implemented for legal reasons, or if implemented would not produce any meaningful change to the existing situation. We have also set out the four meaningful options which may be open to the Minister and discussed the possible impact of each. There remains the issue of which of these options, if any, the Board should recommend to the Minister. On this point the panel members disagree. It is the view of a majority of the panel, namely Board Members Eayrs and Wilson, that in the interests of promoting stability in provincial bargaining, the Minister should not alter the existing *status quo*. They recommend that the Minister neither issue any new designation orders nor amend any of the existing orders. Vice-Chairman Springate disassociates himself from this recommendation. Given Local 2693's 30-year history in representing construction labourers in North Western Ontario and the fact that the introduction of provincial bargaining did not result in any other trade

union losing bargaining rights, it is his view that the appropriate result is one that preserves the local's ICI bargaining rights in that geographic area, whether this be through the adoption of one of the alternatives set out above or through an amendment to the Act. Having made these comments, however, all three panel members recognize that the Minister's decision will depend on his own views concerning the competing interests involved and the relative importance he attaches to each.

2256-87-U; 2268-87-U MacMillan Bathurst Inc., Applicant v. Canadian Paperworkers' Union, Local 1497, Respondent; MacMillan Bathurst Inc., Applicant v. Canadian Paperworkers' Union, Local 1497 and Joao Amarelo and all hourly rated employees of the applicant who are not on layoff, Respondents

Strike - Whether refusal of employees to work overtime constituting an illegal strike - History of employees declining to work overtime whenever there is a layoff - Union posting by-law restricting overtime whenever layoff begins - Board declining to decide whether strike - Board declining to exercise its discretion in favour of issuing a declaration or associated remedies

BEFORE: *Judith McCormack*, Vice-Chair.

APPEARANCES: *Michael Gordon, Thomas Stefanik and Ronald Gruber* for the applicant; *Joe Herbert, Sandra Nicholson, Milton Shapiro and Robert Vey* for the respondents.

DECISION OF THE BOARD; December 2, 1987

1. These matters are two applications for declarations that the refusal of employees to work overtime for the applicant constitutes an illegal strike, and for associated remedies. The applicant and the respondent union are parties to a collective agreement effective July 1, 1985 to June 30, 1988, and there is no dispute that a strike in these circumstances would be untimely.

2. The applicant operates a corrugated carton manufacturing plant in which approximately one hundred and fifty people are employed. The evidence in this matter indicates that for the past 10 years, on every occasion in which there has been a layoff of employees, those employees not laid off have declined to work overtime for the period of the layoff. It was unclear from the evidence whether part of this period might have involved a predecessor company, but both parties did not dispute that this was a well established and regular event between the applicant and the respondents. It is also evident that layoffs were a frequent occurrence; the facts placed before the Board show that there have been at least two other layoffs during the life of the current collective agreement, and one employee testified that he had been laid off twenty times in approximately seven years of employment. Although there were some discrepancies in the evidence on this point, I conclude that on each occasion, the respondent union posted a local union bylaw which provides as follows:

ARTICLE 20 OVERTIME

There will be no overtime worked by members of Local 1497 while other members are on layoff. Except in emergency situations that have been approved by the executive of the local.

This bylaw was voted upon by members and passed at a meeting some years ago. Under the current collective agreement, all employees eventually become members of the union.

3. On the evidence before the Board, it appears that the applicant until now accepted the overtime refusals as a fact of life. Although it is a little difficult to convey the flavour of this acceptance, by way of example, Gerry McNeil, the applicant's plant superintendent indicated that the applicant made its decisions with respect to staffing taking into account that the effect of layoffs would be a ban on overtime. Similarly, the parties made informal adjustments with respect to the bylaw. For example, in the case before us, the applicant gave notice to employees of a layoff on November 4th, 1987 although the layoffs did not actually commence until November 7th. Overtime refusals, however, commenced as of November 4th. As a result, Mr. McNeil spoke to Milton Shapiro, the union's local president, giving his view that the bylaw should not be effective until November 7th. Mr. Shapiro agreed, and spoke to employees to ask them to work overtime until November 7th. It is also apparent that on a number of occasions the applicant and the union have jointly worked out which situations constituted "emergencies" within the meaning of the bylaw.

4. The sequence of events which form the subject of these applications commenced on November 4th, 1987 with the issuance of layoff notices. Some twenty-two employees were laid off, representing a change from a three-shift operation to a two-shift operation. Shortly thereafter, seven more employees were laid off. Subsequent to the adjustment described earlier, overtime refusals commenced in earnest for the period following November 7th. (Some requests to employees to work overtime were made before November 7th but were related to days after November 7th). On November 10th, the bylaw was posted on the union bulletin board, and on November 13th, the applicant filed these applications.

5. Much of the union's evidence was directed toward establishing that employees had individual or personal reasons for declining to work overtime that were unrelated to a common understanding. It may well be that certain employees had personal reasons for their decisions, and that there were other problems leading to overtime refusals in the shipping area in particular. I also accept that there were other factors which partially explain the reduction in overtime hours worked following November 7th. However, in light of the timing and pattern of the refusals, the posting of the bylaw, and a number of statements made by union officials, I conclude on balance that employees were acting in accordance with a common understanding relating to the layoffs.

6. It should be noted that the respondents sought to reopen their case during the hearing to adduce further evidence relating to the issue of whether there was a common understanding. The parties were able to agree on the facts the respondents wished to adduce, although not on whether the Board should consider them. At the time a ruling on the matter was reserved. In coming to my conclusion with respect to a common understanding, I did not rely on this evidence, as ultimately my view was that the respondents should not have been able to reopen their case at that point in the hearing. Having heard the agreed upon facts however, I can say my conclusion would have been no different if I had relied upon them.

7. The substance of the common understanding between employees appears to have been a decision to forego optional work opportunities in the hope that this would provide work for employees on layoff. Employees who testified before the Board described what were obviously deeply felt convictions with respect to the sharing of both available work and the impact of the economic losses suffered by employees on layoffs, and a sense of their own vulnerability in terms of being placed in a similar situation. It was also apparent from the evidence that much of the overtime work requested of employees, at least in the production area, was required because of the layoffs. For example, because the applicant had moved from a three-shift operation to a two-shift

operation, employees were asked to come in before the start of their regular shift to prepare and start up machines which otherwise would have been operating continuously.

8. A number of able and thoughtful arguments were made by all counsel with respect to whether, regardless of the Board's jurisprudence, a concerted refusal to work overtime should be considered to fall within the definition of a "strike" under the *Labour Relations Act*. It is not necessary for me to address those arguments however, because I have determined that I would not exercise my discretion in favour of issuing a declaration or associated relief in any event. To the extent that the arguments made in this regard were also directed to the appropriate exercise of the Board's discretion, they are dealt with below.

9. It is well established, and the parties did not dispute that the Board has such a discretion both as to whether to issue a declaration and with respect to remedy. (*Canadian Elevator Manufacturers*, [1975] OLRB Rep. Nov. 868). There are good reasons why the Board takes this discretion seriously. The definition of "strike" in section 1(1)(o) of the *Labour Relations Act* is a broad one, and leaving aside the respondents' arguments with respect to that definition, at first glance it would appear to sweep in a wide range of activity. This is particularly so given the Board's decision in *Domglas Ltd.* 76 CLLC ¶16,050 to the effect that it is not necessary for the activity to be carried out for the purpose of obtaining concessions from an employer. The broad reach of the Act thus interpreted can lead to some curious results. In *British Columbia Telephone Company* (1980) 40 di 163, the Canada Labour Board puts forward the following examples which may fall within the ambit of a "strike" when it is widely construed:

1. Two or more employees go to lunch. They drink too much and decide not to return for the afternoon.
2. Two or more employees decide to go golfing, fishing or hunting so they call in sick and fail to report to work.
3. One day has special religious meaning for several employees. They are scheduled to work. They fail to report.
4. There is a tragic bus accident in the community. The employer refuses to interrupt production. Employees combine and refuse to work so they can attend the funeral services.
5. There is a mine accident and miners are trapped. Miners in another community employed by another employer refuse to work and volunteer to help in the rescue operations.
6. Truckers on long distance haul encounter a community threatened by flooding or maybe forest fires. Rather than pass on through, they park their rig and volunteer to help.
7. Female employees in a bargaining unit refuse to work because they are joining a protest in support of more women's rights.
8. Longshoremen incensed at the invasion of a country by a foreign power being boycotted by the national government refuse to load vessels destined to that foreign power.
9. An employer schedules employees for more than the hours he is permitted under hours of work regulations. The employees combine and together refuse to work.
10. Employees in a bargaining unit refuse to perform duties of fellow employees who are lawfully on strike.

11. Several employees faced with a working circumstance determine they are in imminent danger to their safety or health and refuse to do the work assigned.

10. Some of these examples are not apt for Ontario as the Board has previously said that both a concerted refusal to work overtime in circumstances where overtime exceeds the maximums set out in *The Employment Standards Act*, R.S.O. 1980, c. 137 and a concerted refusal to work in accordance with the *Employees' Health and Safety Act*, 1976, S.O. 1976, c. 70 [now *The Occupational Health and Safety Act*, R.S.O. 1980 c. 321] will not be considered to be strikes (*Cameron Packaging Inc.*, [1979] OLRB Rep. June 489; *B.C.L. Canada Inc.*, [1981] OLRB Rep. July 836 and *Inco Metals Co.*, [1980] OLRB Rep. July 981). Nonetheless, they do highlight the importance of the Board's discretion in fashioning appropriate responses to the variety of fact situations which come before it.

11. It is also evident that strikes are not usually isolated events occurring in a vacuum. Rather, they are more likely to be part of a series of interrelated events taking place in the context of a labour relationship that may be long-standing and complex. Often the activity which falls within the strike definition is merely the symptom of a more extensive deterioration or breakdown in labour relations. The Board must therefore consider both the appropriateness of intervening to impose its powerful remedies with respect to only one event in this larger picture, and the suitability of any particular remedy in addressing the labour relations problems before it. The fact that the responsibility for this task falls to the Board under section 92 reflects both the Board's special expertise in labour relations matters and a recognition that the *Labour Relations Act* cannot be administered mechanically or without regard to changing social values.

12. The combination of the Board's expertise and the complexity of the situations which may come before it under section 92 reinforce the wisdom of, according to the Board, some flexibility in considering whether to issue a declaration or associated relief. The Board described its discretion in the following terms in *Canadian Elevator Manufacturers*, *supra*:

15. The Board's power under sections 82, 83 and 123 are discretionary and ought to be exercised in accord with sound principles of industrial peace, it cannot be said that this obligation can only be fulfilled by the reflex-like exercise of the Board's powers under these sections. Where, as in this case, an employer deliberately embarks upon a course of action that is unsupported by a reasonably arguable interpretation of the collective agreement, thereby primarily, and we might say baldly, resting its claim on the principle that an employee is obligated "to perform first and grieve later", this Board would not be serving the public by buttressing such recklessness with the full force of the laws of this Province. We of course approve the aforementioned arbitral principle and the Board must be wary in interpreting collective agreements even on a very limited basis. But the application of the arbitral principle in discipline cases is a qualitatively different function than using it to specifically enforce the demands of an employer under the sections in question. To issue such powerful relief in the peculiar circumstances of this case could well undermine the integrity of the Board's orders and discourage the self-restraint required in a complex industrial society. Very similar sentiments, quite appropriate to this case, were expressed by the Board in *Northdown Drywall and Construction Limited*, [1972] OLRB Mthly. Rep. June 666 where the majority of that panel evidenced its concern for self-government in the following way:

...We recognize that this Board has an obligation to maintain industrial peace. We recognize that there is an obligation on the industry to assist in maintaining industrial peace by conducting its affairs in an orderly and careful manner so as to avoid the tensions and conflicts that are already rampant in the construction industry. There must be some form of self-help or policing by the industry. This Board is not to be viewed as a panacea for the ills of the construction industry. We do not sit as Solomon ever ready to divide the baby. We expect that the parties will exercise some self-restraint in their affairs and not expect this Board to be a forum which absolves them from excesses.

Because the purpose of the remedies available under section 92 is to educate rather than to punish, the Board will usually decline to grant a declaration or directions if the unlawful activity has ceased by the time of the hearing (*Steinberg Inc.*, [1983] OLRB Rep. Feb. 253). The Board has said in this regard that it “must be cautious that its intervention, by way of declaration, will play some constructive role, rather than disrupt a relationship which, by the time of the hearing, has stabilized” (*Norfolk Hospital Association*, [1974] OLRB Rep. Sept. 581). In addition, the Board may also decline to grant declarations where the employer’s application or conduct has been provocative or facetious (*Ontario-Minnesota Pulp and Paper Co.*, [1978] OLRB Rep. July 668; *Pigott Construction Limited*, [1976] OLRB Rep. April 160; *Ottawa Civic Hospital*, [1986] OLRB Rep. June 812).

13. In this case, the respondents argue that we should decline to issue a declaration or directions for a number of reasons, including the fact that employees are entitled to refuse overtime work under the collective agreement, the nature of overtime work itself, and the existence of an established practice between these parties where overtime refusals have gone hand in hand with layoffs. Turning to the first two arguments, the applicant conceded that an employee does have the right to refuse overtime work under the collective agreement between the parties. Leaving aside the question of whether overtime refusals in concert constitute a strike, the gist of the respondents’ argument with respect to discretion is that the applicant is asking the Board to compel employees to work overtime when it gave up that right in collective bargaining. There are a number of problems associated with that argument. The Board has said that the fact that parties have sanctioned certain conduct in their collective agreement will not prevent that conduct from falling within the ambit of the strike prohibition. To hold otherwise, the Board has commented, would be to allow parties to contract out of the *Labour Relations Act*. (*Belmont Plastering Company Limited*, [1970] OLRB Rep. March 1459). While considering the kind of collective agreement provisions before me in the context of exercising discretion may not necessarily have the same implications, it is also true that an injudicious use of that discretion may undermine the purpose of the mid-term strike ban. In addition, this approach may also have the effect of drawing into section 92 a somewhat controversial body of arbitral jurisprudence.

14. At the same time, a binding collective agreement is the centerpiece of the scheme of collective bargaining contemplated by the *Labour Relations Act*. Indeed, it is difficult to divorce the ban on strikes during the term of a collective agreement from the importance of the collective agreement itself. It seems inconsistent for the Board to issue remedies to enforce the strike ban at the expense of rights under a collective agreement, when the purpose of the ban is at least in part directed at protecting that same agreement. As well, collective agreements are typically package deals, arrived at by a process of trade-offs in negotiations. In the ordinary course of events, it is not unreasonable to infer that the applicant obtained some other benefit in exchange for surrendering the ability to compel employees to work overtime, and that employees gave up some right or benefit to obtain the right to refuse. If the Board cannot restore to a party that which was given up, a remedy which erodes the rights obtained in exchange may have an inequitable impact.

15. My concerns in this regard cannot be separated from the nature of the rights involved in this case. The respondents argued that overtime work, by definition, involves something above and beyond the regular commitment made by an employee. There is some merit in the point of view that overtime is inherently extra work, something “over” that which employees have contracted to provide. The collective agreement in this case, which includes specified regular hours of work and voluntary overtime provisions, only serves to bring this more general proposition into sharper focus. This is not to say that overtime is not also considered a precious commodity in many work places. The collective agreement in this case and many others provide for overtime distribution schemes of various kinds for that very reason. But it is not a contradiction to say that overtime is both voluntary and prized, or that it is optional but must be distributed in accordance with a cer-

tain formula. It is also difficult to ignore that behind this proposition lies an historical social movement in regard to the length of the work day which has coloured public policy with respect to minimum working conditions. The Board commented on that policy in *Cameron Packaging Inc.*, [1979] OLRB Rep. June 489 in a discussion of the strike definition in the *Labour Relations Act*, and the overtime provisions in the *Employment Standards Act*:

32. As was said in the *C & C Yachts* case, "the setting of maximum hours of work in the day or the week is a matter of public policy. That policy is enforced by rendering both employers and employees liable to prosecution for sponsoring or performing work in excess of the maximum hours". In our view The Labour Relations Act must be interpreted to be consistent with this announced public policy, and it would be patently absurd for us to find that refusal to engage in conduct, which would be in breach of The Employment Standards Act if engaged in, should nonetheless be considered a breach of The Labour Relations Act. When the Legislature defined "strike" as it did in section 1(1)(m) of the Act it can only have been referring to actions which would be lawfully permissible save for the fact that they are undertaken "in combination or in concert". Under the circumstances of this case the employer was precluded by law from requiring employees to work in excess of eight hours in any day and the refusal by employees to do so cannot be used to be found a contravention by them of the Labour Relations Act.

16. In this case some of the overtime work declined would not fall within the area characterized as voluntary under the *Employment Standards Act* because overtime under the collective agreement is triggered at an earlier point. However, it is not evident that the *Employment Standards Act* overtime provisions are necessarily exhaustive as an expression of public policy in this regard. Among other things, that Act also provides that where a collective agreement provides a greater right or benefit than the Act, the collective agreement provisions will prevail (section 4). As well, the criteria for overtime in the Act are currently under active review (see *Working Times: The Report of the Ontario Task Force on Hours of Work and Overtime*, 1987). Similarly, the Board cannot afford to be insensitive to the fact that overtime work is the subject of considerable social debate in a society grappling with the implications of layoffs, unemployment and technological change. Where parties have arrived at their own accommodation of their competing interests in this regard, it may be inappropriate for the Board to disturb that balance.

17. Turning to the respondents' last argument, the Board has held previously that a history of unlawful strikes may prompt it to issue a declaration regardless of whether employees have already returned to work (*Ball Brothers Limited* 57 CLLC ¶18,091; *Goodyear Tire and Rubber Company of Canada Limited*, [1967] OLRB Rep. Oct. 655). In this case, however, it is argued that the history between the parties should have a different effect. This is not a situation where an employer has made it clear to employees that their conduct is unacceptable and has pursued its legal remedies. Neither is it a case where an employer has settled short of legal remedies in the interests of good labour relations or because the remedies have become moot as a result of a return to work. Rather, the parties here have accepted for many years that overtime bans follow layoffs as a matter of course. Indeed, in this case, they negotiated the date on which the ban would commence. While the distinction between this situation and that typified by *Goodyear Tire*, *supra*, may be fine, it is also important. One of the hallmarks of labour relations is that a continuing relationship is involved. In the circumstances of this case, and for all the reasons described above, I am not persuaded that it would be in the interests of harmonious labour relations for the Board to step in at this point and direct the remedies requested at only one aspect of this informal trade-off. While I recognize that the overtime refusals caused the applicant some inconvenience, in this situation it would be more appropriate for this problem to be addressed at the bargaining table.

18. This is not to suggest that employers who forego litigation for sound labour relations reasons will find themselves without a remedy at some later point. I feel compelled to reiterate that this case is significantly different from that addressed by the Board in the *Goodyear Tire* line of

cases, both in terms of the extent to which the parties have accepted this situation and in light of the other facts set out above. In addition, this more extensive discussion of the Board's discretion under section 92 does not mean that the Board cannot continue to respond to more routine cases in a routine manner. This was simply not such a case. For all these reasons, I decline to exercise my discretion in favour of issuing a declaration or associated remedies in these matters.

2050-87-R International Union of Operating Engineers, Local 793, Applicant v. Madeleine Mines Ltd., Respondent

Right of Access - Terms of access order determined - Mere possibility of violence not a compelling reason to restrict access to bunkhouse - No reason to direct a more limited duration of the order than one year

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *R. M. Sloan* and *B. L. Armstrong*.

APPEARANCES: *Jack J. Slaughter* and *Patrick Maley* for the applicant; *Daniel Vukovich* for the respondent.

DECISION OF THE BOARD; December 14, 1987

1. This is an application under section 11 of the *Labour Relations Act* for a direction giving the applicant access to property described in the application as

Madeleine Mines Site, approximately 65 miles north of Hwy. 17, and 7 miles West of Spruce River Road, District of Thunder Bay.

Section 11 of the Act provides:

11. Where employees of an employer reside on the property of the employer, or on property to which the employer has the right to control access, the employer shall, upon a direction from the Board, allow the representative of a trade union access to

the property on which the employees reside for the purpose of attempting to persuade the employees to join a trade union.

It is conceded that employees of the respondent reside on the subject property and that the respondent has the right to control access to that property.

2. The respondent does not oppose our granting some direction. The parties agreed to the following terms of access:

• • •

1. Two authorized representatives of the International Union of Operating Engineers, Local 793 (the "Union") shall be entitled to access to the project on the terms and conditions described herein.

2. The two authorized representatives of the Union shall be allowed access to the project from 6 p.m. to 11 p.m. on a 7 days per week basis, provided that 48 hours notice shall be given to the Company by any means of telecommunications to its Toronto office to the attention of Mr. Dan-

iel Vukovich. There shall be 48 hours notice for each visit and the parties agree "visit" to mean a number of consecutive days not to exceed 5.

3. In terms of facilities, the two authorized union representatives shall be allowed access to the recreation area, and mess hall, and agree to obey all camp rules and regulations.

4. In terms of time of access, the two authorized union representatives shall have immediate access to the project via helicopter or by the timber road lying to the west of the property. The two authorized union representatives shall have access to the project effective December 12, 1987 via the road running westerly off Spruce River Road to the project subject to the Union representatives executing a waiver of liability applicable to the road running westerly off Spruce River Road to the project only, said waiver to contain such reasonable terms consonant with industry practice. It is agreed that the Company does not control access to the timber road lying to the west of the property.

5. The two authorized union representatives undertake not to disrupt or interfere with employees or with work in progress on the road running westerly off Spruce River Road to the project or on the property to which the Company has the right to control access, and to abide by all applicable safety and security regulations.

When the matter came on for hearing on November 20, 1987, the respondent was seeking two additional limitations on access:

- 1) That access be restricted to a period of 30 days.
- 2) That access be confined to the mess hall and all recreational facilities and not extend to the bunkhouses.

The applicant would agree that the order have a one-year term but pressed for access to bunkhouses. After hearing the respondent's submissions in support of these restrictions, we ruled orally that the applicant would have access to the bunkhouses, that the access order would have effect for a term of one year from that day (November 20, 1987) and that the respondent was directed to forthwith grant the applicant access to the subject property on these and the agreed terms. We now set out our reasons for that ruling.

3. The purpose of section 11 was addressed in *Domtar Inc.*, [1987] OLRB Rep. April 485, at paragraphs 8 and 9:

8. The freedom to join a trade union (or, as in this case, change unions) may be seriously impeded where the employees not only work but also reside on the property of their employer. In those circumstances, absent a direction of the kind envisaged by section 11, the employer would have the right to control access to the employees even on non-working time. Any union organizer who entered onto the employer's property without permission would run the risk of being charged with trespass (see *R. v. Labelle* (1965), 48 D.L.R. (2d) 37, 65 CLLC ¶14,056). But in a system based upon membership cards signed by the employees, such contact is imperative if a certification application is to be successfully launched. That is why what is now section 11 of the Act was added in 1970 to remove this impediment. To this extent, a Board direction under section 11 does limit or modify the employer's pre-existing property rights.

9. ... Anything which delays or impedes access to the employees for the purpose of signing membership cards may limit their right to be represented by the union of their choice; and section 11 makes it abundantly clear that such contact should not be limited solely because the employer controls access to the premises on which the employees reside.

4. The only prerequisite to the granting of an access order under section 11 is the one articulated in the section: there must be employees who "reside" on "property of the employer" or on "property to which the employer has the right to control access" (see, generally, *Great Lakes*

Forest Products Ltd., [1987] OLRB Rep. Sept. 1136). It seems it has always been assumed, as the parties to this application did, that the Board's jurisdiction to direct that access be given includes jurisdiction to define the times at which, terms on which and persons through whom an applicant trade union may have access to the property on which employees reside. These are matters on which applicants and respondents have generally agreed. As a result, the Board has not had much occasion to comment on the principles which ought to be applied in determining the terms on which access is granted.

5. The matter of terms of access was addressed in *Campbell Red Lake Mines Limited*, [1983] OLRB Rep. May 623, where the Board considered whether concern about possible violence warranted denial of or restrictions on the right of access:

The Access Issue

9. A little over a year ago, pursuant to section 11 of the *Labour Relations Act*, the Steelworkers sought access to the respondent's employees. As we have already noted, the Detour Lake project, where the employees work and reside, is an isolated location accessible only by air. That application was settled on terms which need not be set out here, save to note that it was granted on terms which would minimize disruption of the respondent's operations. Subsequently, it appears that the respondent has also accorded approximately the same access to representatives of the Mine Mill. No specific access has been given to the IBEW or the IUOE nor has any such access been sought.

10. Counsel for the respondent expressed his concern that the extension of the terminal date could spark a period of inter-union rivalry in which all four unions would seek access to the respondent's work site; and, he noted that this work site was designed to afford accommodation to persons actually working there, not union organizers. In view of the unfortunate consequences sometimes associated with inter-union rivalry in the north, he urges the Board to either ban access too the work site altogether, or set out some general rules within which the various union representatives must conduct themselves.

11. We decline to do so. The respondent has already established certain basic ground rules which have been extended to both the Steelworkers and Mine Mill. We see no reason, at this stage, to depart from those ground rules, to affirm or deny their applicability to other unions, or to substitute such other rules as, in our view, might be more appropriate. We do not think that we should presume that the inter-union rivalry apparent in this case would necessarily result in a disruption of the respondent's ongoing business operations. On the other hand, we do note that the respondent is in the mining business. It is not running a hotel for union organizers. We see no reason why the respondent should subsidize the unions' organizing costs, and we expect that the applicants involved in this matter will reimburse the respondent for all reasonable costs associated with the pursuit of their rights under the Act. Further, we note as we did at the hearing, that the unions' right to be present at the work site is ultimately founded upon the employees' right to form or join a trade union. There is no right to engage in organizing activities during working hours or which spill over into working hours. Should there be any disruption of the employer's production process, we would be sympathetic to any employer action reasonably required to minimize such disruption.

6. In *Gaston H. Poulin Contractor Limited*, [1987] OLRB Rep. Jan. 48, the applicant agreed that its representatives would abide by all security and safety regulations on the property, but resisted a requirement that they sign a "waiver of liability" with respect to any injury or loss which they might incur while on the site. The Board declined to impose that term:

7. When directed by the Board, access by union representatives to a job site is a statutory right. The union representatives are in a position similar to others with a legal right to be on the site. The exercise of this right should not be made subject to a willingness to waive liability. In the unlikely event that a union representative is injured or suffers loss when on the job site, the rights of the parties will presumably be determined by a court of competent jurisdiction. Given

these considerations, at the hearing we rejected the respondent's request that the union representatives be required to sign a waiver of liability.

7. *Ledcore Industries Limited* (Board File No. 2051-87-M) was an application for access heard by this panel on the same day as this application. There, the respondent asked that the applicant be denied access to bunkhouses. The respondent's argument and our response to it are reflected in the following paragraphs of the decision we delivered orally at the conclusion of the hearing in that matter:

7. None of the cases cited deals with the matter of access to the bunk house. The respondent says each bunk house consists of a series of rooms adjoining a common hallway. Two persons reside in each room. Generally one is a day shift employee and the other works on the night shift. There are also bunk houses in which employees of the Ministry of Transportation and Communication reside; sometimes a bunk house may contain both employees of the respondent and employees of the MTC. Bunk house rooms are locked. Only the occupants of a room have unrestricted access to it. While a member of management could enter the bunk house hallway and knock on a door, he or she could not enter a room except on the invitation of an occupant. Presumably the two occupants work out between themselves what authority either has to admit visitors in the absence of the other.

8. The respondent argues that access should not be granted to bunk houses because that would infringe on rights of employees living there, employees who have had no notice that these rights were in jeopardy in this application. The respondent also argues that organizing is better conducted in the mess hall than in bunk houses where walls are paper thin and the total absence of management personnel cannot be guaranteed.

...

10. A section 11 direction interferes with an employer's right to restrict access to property over which the employer has control. Subject to the terms of the direction, the employer is prevented from denying access to the union's representative. Employees, however, are not prevented from denying access to their private rooms. They are not obliged to speak with the union representative. They are not obliged to go to any meeting. Union representatives are simply put in the same position as any resident employee, so that opportunities for communication are not limited by the assertion of employer property rights any more than would be the opportunities for communication between resident employees. The respondent has not identified any legitimate interest it may have as employer or in relation to the property which would not be adequately served by the terms proposed by the applicant plus [certain additional terms which made no distinction between the bunk houses and the rest of the property].

8. Counsel for the respondent in this application was present when we delivered our decision in *Ledcore*. He was asked how the circumstances of this case or his argument for denial of access to bunkhouses was distinguishable from the circumstances and argument in *Ledcore*. He said the only different factor was the respondent's concern that fights might break out in the bunkhouses as a result of union representatives knocking on doors. He said this concern was based on experiences the employer had had at other camps. He said management could deal with violence if it broke out in the mess hall, but not if it broke out in the bunkhouses. He added, however, that the respondent had no objection to a union representative's entering the bunk house to visit an employee at the invitation of the employee as a result of some discussion in the mess hall or recreational facilities.

9. The property to which section 11 contemplates a direction granting access is the property on which employees "reside." While this "employee residence" characteristic may not attach to all of the property owned or controlled by the employer, it must surely attach most strongly to the bunkhouse. That is, therefore, the part of the property to which the Board is least likely to restrict access. We certainly would not do so unless there were a compelling reason. The mere possibility of violence is not a compelling reason.

10. The respondent argued that there should be a limit on the duration of the order because the property might be occupied for some time if its current explorations result in the establishment of a mine.

11. Nothing in section 11 suggests that a direction thereunder should have a limited term. Once it is accepted that the granting of a direction is a matter of discretion even when the preconditions therefor are met (see *Great Lakes Forest Products Ltd.*, *supra*, at paragraph 26) and that some terms limiting access can be imposed, it may then be said that there should be some mechanism by which changes in circumstances can be taken into account. One way to do that would be to give any direction limited duration, so that circumstances must be reevaluated in a fresh application if the union desires continued access after the initial period. Of course, the Board has the power under subsection 106(1) to reconsider and vary any previous order. Thus, an access direction of unlimited duration is not immutable. The applicant's agreement to a one-year limit (without prejudice to its right to apply for a further direction covering the subsequent period) made it unnecessary for us to resolve the balance of administrative convenience between time-limited directions which may have to be renewed and unlimited directions which may have to be reconsidered. We did not see in this case any interest of the respondent as employer or in relations to the property which warranted giving our direction more limited duration than one year.

3056-86-R; 3057-86-R International Association of Machinists and Aerospace Workers, Applicant v. Toledo Scale Division of Reliance Electric Limited and **Masstron Scale Ltd.**, Respondents; International Association of Machinists and Aerospace Workers, Applicant v. Masstron Scale Ltd. and Toledo Scale Division of Reliance Electric Limited, Respondents

Bargaining Rights - Evidence - Related Employer - Non-unionized company bought by unionized company - Board relying on extrinsic evidence of past practice to determine contours of applicant's existing bargaining rights - Board exercising discretion to issue one employer declaration and declaration that non-unionized company bound by the collective agreement between the applicant and the unionized company

BEFORE: *Judith McCormack*, Vice-Chair, and Board Members *F. C. Burnet* and *J. Sarra*.

DECISION OF JUDITH MCCORMACK, VICE-CHAIR, AND BOARD MEMBER J. SARRA;
November 26, 1987

1. These matters are applications under section 63 and 1(4) of the *Labour Relations Act* in which the applicant alleges that Masstron Scale Ltd. ("Masstron") is a successor employer to Toledo Scale Division of Reliance Electric Limited ("Toledo") and that the two companies are associated or related businesses under common direction and control. Among other things, the applicant has asked us to declare that Masstron is bound to a particular collective agreement between the applicant and Toledo dated October 29th, 1986.

2. Both respondents are engaged in the business of selling and servicing commercial scales of various types. As a result of a series of transactions, the respondents concede that as of December 1986, a sale of Masstron to Toledo within the meaning of section 63 of the Act had taken place.

The parties further agree that the respondents are associated or related businesses under common control and direction within the meaning of section 1(4). Masstron is still a separate corporate entity from Toledo. However, the respondents ask us to exercise our discretion not to issue declarations under either section on the basis that such declarations, and particularly a declaration that Masstron is bound to the collective agreement in question, would have the effect of extending, rather than merely protecting the applicant's bargaining rights. The applicant disputes this proposition and argues that declarations are necessary to prevent the erosion of its bargaining rights. In light of the Board's jurisprudence with respect to section 63, and in particular *Kerr-Progress Printing*, [1975] OLRB Rep. July 590, we find it more appropriate to consider this matter with reference to section 1(4).

3. Prior to the sale of Masstron to Toledo, Toledo employees serviced customers out of fourteen district offices in Ontario. Employees operating out of offices in London and Barrie were covered by a collective agreement between the applicant and Toledo which is not in issue here. Employees operating out of a number of other offices including Sudbury and Sault Ste. Marie were not covered by any collective agreement. At that time, Toledo serviced customers in the Burlington and Oakville areas from its Hamilton district office. Customers in the Mississauga area were serviced by employees operating out of its Toronto district office, and customers in the Cambridge and St. Catharines areas were serviced by employees from those district offices respectively. Masstron serviced all of its customers in Ontario from one office in Burlington. Eighty per cent of Masstron's accounts are in the Golden Horseshoe area described below, and its employees were not covered by a collective agreement.

4. When Toledo acquired Masstron, it reorganized the servicing of customers so that a number of customers in the Burlington, Oakville and Mississauga areas previously serviced by unionized employees from the Toledo Toronto and Hamilton district offices were now serviced by employees from Masstron's Burlington office who, it is alleged, are not covered by the Toledo collective agreement. Some of the servicing of Masstron customers was shifted to Toledo's Toronto, Hamilton, St. Catharines and Cambridge district offices. It is difficult on the evidence before us to assess precisely the net results of this re-allocation. However, the respondents provided the Board with figures representing the re-allocation of contract customers in this area. (Contract customers are those who enter into a service contract either for a reduced rate for on-call service or for regular service visits. The respondent also has other customers who are serviced only on an on-call basis without any prearrangement as to rates.) The figures provided by the respondents show that some fifty per cent more contracts were transferred from Toledo district offices falling under the collective agreement to the Masstron office asserted to be outside the ambit of the collective agreement than were transferred to unionized Toledo offices from the Masstron office. In other words, there has been a significant net movement of work from the unionized Toledo offices to the Masstron office the respondents claim is not covered by the collective agreement. The evidence before us indicates that the volume of work transferred is proportional to the number of service contracts. The bulk of Masstron customers in the Oakville, Burlington and Mississauga area continue to be serviced from the Masstron office. The respondents plan no reduction in the Toledo work force except for a possible increase of one person in the St. Catharines district office and a possible decrease of one employee in the Toronto district office.

5. The nature of this dispute suggests that it is important to assess the extent of the applicant's bargaining rights prior to the sale. While it appears from Article 1.02 and 1.03 that the applicant was originally possessed of bargaining rights by virtue of four separate certificates issued by the Board, the Board was advised that these rights were consolidated into one bargaining unit under one collective agreement at a later point. The Board has said that the parties can modify the contours of their bargaining rights and that the bargaining rights delineated in the scope clause of a

collective agreement will supercede those set out in an earlier certificate (see, for example, *Ault Foods Limited*, [1987] OLRB Rep. Jan. 12.) Thus an interpretation of the scope clause in the collective agreement between Toledo and the applicant is central to a determination of the extent of the applicant's pre-sale bargaining rights. And indeed the parties agreed that we could and should interpret that scope clause, which reads as follows:

ARTICLE 2 - RECOGNITION

2.01 The Company recognizes the Union as the sole and exclusive collective bargaining agency for all employees at its Metropolitan Toronto, Hamilton, St. Catharines and Cambridge district offices, save and except Service Managers, Assistant Service Managers, persons above the rank of Service Manager and office and sales staff.

6. Counsel for the respondents takes the position that this clause unambiguously covers only those employees working out of the district offices listed in the clause. On this interpretation, he argues that prior to the sale, Toledo would have been free to open a new district office in southern Ontario, shift employees and customers' accounts to that new office and the collective agreement in question would no longer apply to the same employees providing the same service to the same customers. Counsel is of the view that the bargaining rights attach only to the district offices listed, and he analogizes the situation to that of an industrial plant moving outside of the geographic scope of a recognition clause. The Masstron office is the equivalent of a new Toledo office and, it is argued, is therefore not subject to the applicant's bargaining rights.

7. Counsel for the applicant argues that a latent ambiguity is revealed by the application of the scope clause to these circumstances and that we should use the parties' past practice to interpret the clause. The evidence before the Board indicates, and the respondents concede, that for many years both parties had accepted that the applicant "owned" certain territories by virtue of the collective agreement. Counsel for the respondents states that these territories were defined by the boundaries of the municipalities or cities in which the district offices were located. Thus, all customers situated within the boundaries of the Municipality of Metropolitan Toronto would be serviced by employees operating out of the Metropolitan Toronto unionized district office. If it became necessary to send an employee to service a customer in this area from another district office not listed in the collective agreement, he would be treated as if he fell under the agreement in terms of wages and working conditions while servicing the customer in the Toronto area.

8. The applicant agrees generally with this description of the parties' practice but says that the geographic territory which was treated as "union" covers a much larger group of areas surrounding the district offices including areas around Toronto, Burlington, Mississauga, Brantford, Cambridge, Oakville, Greater Hamilton and the Niagara Peninsula which we will refer to here as the "Golden Horseshoe". The respondents concede that prior to the sale, no Toledo customers in the Golden Horseshoe area had ever been serviced by employees treated as falling outside the collective agreement. Since the sale Masstron employees whom the respondents assert are not covered by the collective agreement are servicing both Toledo and Masstron customers in this area. Outside this area, for example, in the Oshawa area, it appears that customers had been serviced both by employees from offices falling under a collective agreement and by those from non-unionized district offices as well. However, in these "non-union" territories, an employee originating from a district office not listed in the collective agreement would not be treated as falling under the collective agreement. Only those from district offices listed in the collective agreement would be dealt with in this manner. When the Oshawa office opened, it was not treated by either party as falling under the coverage of the collective agreement. There was some suggestion that other new depots were handled in the same manner, but we found that evidence, which was in the nature of

double hearsay, too weak and vague to be reliable. In the absence of an explanation as to why first hand evidence could not be adduced, we are not prepared to accord it any weight.

9. Although we agree that the respondent's position is a possible interpretation of that scope clause, it is clear that it renders the applicant's bargaining rights extremely fragile. It appears that many employees of the respondent are on the road much of the time, and some operate more out of their homes than the district office to which they are nominally attached. As a result, the nature of the respondent's business means that if the respondents' position is correct, the applicant's bargaining rights could be effectively extinguished by the stroke of a pen. Indeed, counsel for the respondents conceded that the respondents' present position might seem absurd. In these circumstances, we find it difficult to conclude that the parties intended the bargaining rights to be quite so ephemeral as the respondents now claim. Although it is not uncommon for bargaining rights to be vulnerable to some extent to good faith relocation by an employer, the respondents' interpretation would result in an unusual degree of vulnerability given the nature of their operations. It therefore appears to us a latent ambiguity arises in the clause when it is read in its proper labour relations context, and for that reason, we find it useful to turn to the parties' past practice.

10. The respondents suggest that there is no consistent past practice since the Oshawa office was treated as not within the ambit of the collective agreement by the applicant. In the alternative, counsel relies on the evidence described earlier with respect to the opening of other offices to suggest that the past practice supports the respondents' position. Although the evidence is not unequivocal, on balance we are not inclined to agree with either argument. The evidence indicates that the parties have defined the bargaining rights reflected in the scope clause in two ways: by the district offices listed in the clause and by the concept of work performed by employees within union or non-union territories. An employee attached to a district office listed in the collective agreement is covered by that agreement regardless of where a customer is located, while an employee from a district office not listed in the collective agreement is covered only when he is working in a union territory. While this dual system seems somewhat elaborate and the geographic configuration of those territories is anomalous, it does appear that both parties consistently honoured those boundaries. In other words, on the evidence before us the parties have without exception adhered to a particular pattern of bargaining rights. While the pattern itself is untidy, the parties' practice in adhering to it is not. For reasons described earlier, we are not prepared to rely on the evidence with respect to the opening of other offices besides the Oshawa office.

11. The respondents also argue that Toledo's practice of paying collective agreement wages and benefits to employees servicing customers in the Golden Horseshoe area, regardless of their district office of origin, does not suggest a tacit or *de facto* recognition of bargaining rights. Counsel cites *Farquhar Construction Limited* [1978] OLRB Rep. Oct. 914 in this regard. However, in that case the Board's decision turned at least in part, if not primarily, on the finding that the language of the scope clause was restricted to on-site construction work and thus did not cover employees engaged in manufacturing work. Moreover, the Board's comments with respect to the extension of collective agreement benefits are specifically described in terms of the practices of the construction industry. There was no evidence before us with respect to this sector which would support a similar conclusion in the instant case. There was also no evidence to suggest that the application of the collective agreement to these employees was restricted or qualified in any way.

12. In these circumstances while an express formal acknowledgement of the bargaining rights as reflected in the parties' past practice would be helpful, we do not find it essential. To hold otherwise would be to suggest that a scope clause is uniquely insulated from the kind of conclusions which may be drawn from past practice evidence in interpreting the other clauses in a collective agreement. Moreover, since the bargaining rights are now rooted in the collective agreement,

the consistent application of that collective agreement speaks clearly of the parties' mutual understanding with respect to the contours of those bargaining rights. On the facts before us, we find that the parties' practice amounted to an informal but consistent recognition of a particular pattern of bargaining rights. The evidence before us conforms to the principles relating to extrinsic evidence set out in the case of *John Bertram and Sons Co. Ltd.* (1967) 18 L.A.C. 362, and in light of the latent ambiguity described earlier, we are prepared to interpret the collective agreement in the same manner as the parties themselves have in the past.

13. Employees working out of the Masstron office are performing work in the Golden Horseshoe area, that is, in the territory treated as "union" by the parties, and the evidence before us is that employees in that office are servicing a large number of customers formerly serviced by Toledo employees. But for the fact that they are Masstron rather than Toledo employees, the scope clause as we have interpreted it would include them within its ambit. If we were to decline to issue the declarations requested, the effect would be that non-union employees would be working in an area in which employees working were previously treated by the parties as falling under the collective agreement. To that extent the bargaining rights as the parties have defined them would be eroded. Conversely, if we were to grant the declarations, the effect would be that the collective agreement which was previously applied to employees who work in this area by the parties, would continue to be applied to employees working in this area. This does not strike us as amounting to an extension of bargaining rights.

14. Evidence was also led by the applicant with respect to negotiations for the current and previous collective agreements. While we found this evidence inconclusive with respect to interpreting the scope clause, it did show incidentally that the applicant had tried to expand its bargaining rights in the course of negotiations to cover all of Ontario. We do not conclude from that evidence that the applicant is now using section 1(4) to avoid the certification process. Indeed, this would be a rather strained conclusion based simply on those facts. We also note that the applicant clearly viewed the bargaining rights in the Golden Horseshoe area as established and recognized at the time these proposals were made. What it sought to do in negotiations was to enlarge upon those rights so that they were recognized throughout the province. In the case before us, our declaration with respect to the respondents' status as associated or related employers would be province-wide. However, the applicant has only sought to have Masstron declared bound to the collective agreement before us, which is limited in its scope as we have interpreted it. Thus a declaration that Masstron is bound to that agreement will not have the effect of providing the applicant with the result it sought to achieve unsuccessfully in negotiations.

15. Counsel for the respondents argues that if we were to grant declarations in this case, the result would be to suggest that section 1(4) protects the allocation of work to employees rather than simply bargaining rights. We note the Board has found that one of the purposes of section 1(4) is to prevent existing bargaining rights from being eroded by the direction of work away from a unionized firm to a non-unionized firm (see, for example, *M. J. Guthrie Construction Limited*, [1982] OLRB Rep. Sept. 1332; *Evans-Kennedy Construction Limited*, [1979] OLRB Rep. May 388, and *Joe Franze Concrete Limited*, [1983] OLRB Rep. Apr. 631.) In other words, it may not be possible to draw a meaningful distinction between effective bargaining rights and the movement of work in some circumstances. However, in this case, the parties themselves had previously defined the bargaining rights at least in part in terms of work performed within a particular geographic area. Declarations in this case would continue the bargaining rights in the same form. We reject the respondents' comparison of this situation to an industrial plant relocating outside the geographic scope of a recognition clause for similar reasons. On the facts before us, the case is more analogous to a situation where a company opens a new plant within the geographic scope of a recognition clause.

16. We conclude that the declarations requested would operate to protect rather than extend the applicant's bargaining rights. On the basis of the evidence before us and the facts agreed upon by the parties, and pursuant to section 1(4), we find that the respondents are carrying on associated or related businesses under common control and direction, and we direct that they be treated as constituting one employer for the purposes of the *Labour Relations Act*. We further declare that Masstron is bound to a collective agreement between Toledo and the applicant dated October 29, 1986 as if Masstron had been a party thereto.

17. Rather than addressing the other remedies requested at this time, the applicant asked us to allow the parties to attempt to resolve their differences in this regard first. We find this a reasonable approach. However, we remain seized with respect to other remedies and implementation, should it become necessary for us to deal with these issues.

DECISION OF BOARD MEMBER F. C. BURNET;

1. The company operates from depots at Windsor, London, Sarnia, Hamilton, Cambridge, St. Catharines, Toronto, Sudbury, Sault Ste. Marie, Barrie, Cornwall, Ottawa, Brockville and Kingston.

2. A collective agreement exists between the parties, which recognizes the union as bargaining agent in respect specifically of employees of the Toronto, Hamilton, St. Catharines, Brantford and Cambridge depots. London and Barrie are covered by separate agreements between the parties. Other depots are not unionized.

3. The company purchased a competitive company, Masstron, which operated out of Burlington. This Burlington depot was retained and the company rationalized its service network by redistributing accounts between its depots. Some of the newly acquired Masstron accounts were transferred to Hamilton, Toronto, St. Catharines and Cambridge (i.e. from non-union to union depots). Burlington picked up certain accounts in Mississauga and Oakville previously served from Toledo depots in Toronto and Hamilton (i.e. from union to non-union depots). Four employees previously assigned at unionized Toledo depots were reassigned to work out of Burlington depot.

4. The union requests the Board under section 1(4) to declare Masstron as a successor employer, "bound by the existing collective agreement between the applicant and the respondent Toledo". The company agrees that there has been a sale and that the two companies involved are now under common direction and control but contends that the Board should not exercise its discretion under section 63(4)(d) for various reasons following.

5. The thrust of the union's contention is that prior to the merger the work done by Toledo from Toronto through the so called "Golden Horseshoe" to Niagara was performed almost exclusively by unionized employees covered by the group agreement described in paragraph 2; and that this constitutes a *de facto* voluntary recognition by the company that the work from any other depot opened or acquired in that area of south western Ontario, including specifically Burlington is therefore covered by the agreement. The union acknowledged that there has never been any request or claim of this kind put directly to the company or any discussion, but argues that the history and practice represent voluntary acquiescence by the company. The union supplements its contention with the argument that if the company can introduce new depots into south western Ontario outside of the cities named in the scope clause, then the company could effectively erode the bargaining unit.

6. The company contends that the scope clause of the agreement is clear and specific and applied only to the employees at the named locations; that in common with general practice, cer-

tification or recognition of union bargaining rights is geographically based, rather than work related; and that under existing law, an employer may indeed move operations from one location to another to the possible detriment or even extinction of a bargaining unit, provided that such move is motivated by business reasons and not tainted by anti-union bias; and that the instant situation is merely a continuation of a long established practice by which the company has built up a network of depots from an original base of one depot serving all Ontario, a process historically involving the transfer of customer accounts between depots, without regard to their union or non-union status and with unionization following or not as employees themselves may initiate and decide.

7. The company further noted that there has been no unfair labour charge or any imputation that its motives were based on other than sound business reasons; it provided evidence that in the instant case, while accounts and staff have been transferred with “gains” and “losses” as between unionized and non-unionized depots, the total number of persons covered by the union agreement (approximately 37) will be unaffected by the Burlington acquisition (an initial decline of several unionized personnel occurred at or about the time of re-organization, by virtue of assignment of certain employees to the Burlington depot, but these are or will be replaced by recruiting at unionized depots).

8. The company stated that while each depot generally serves its own area, there are occasional crossovers for vacation or sick relief or special demands. In practice the company avoids sending non-union employees into a unionized jurisdiction, although it may send unionized personnel into non-union areas. It denies however that this implies or constitutes recognition of the union for all of the “Golden Horseshoe”. It noted on the contrary that the union has consistently sought recognition for all Ontario in each set of negotiations and this demand has always been rejected by the company.

Conclusions

9. I conclude on the balance of evidence and argument that the application fails. The scope clause is clear and confines union recognition to the employees based at the designated depots. Had it been the intention when the group agreement was negotiated that it should cover the “Golden Horseshoe” (whatever that may encompass), or any depots in other cities established in future, it would surely have been so worded. On the contrary, the union admitted that it had never faced the company with a direct demand for such recognition, but only for the entire province and that was rejected. The company’s understandable practice of not sending non-unionized relief personnel into unionized depots cannot be reasonably escalated into a voluntary extension of the recognition clause. Perhaps that was the union perception, but even if honestly held, such unilateral perceptions by either party are not a basis for declaring the agreement amended.

10. Past practice in fact supports the company’s position. There has been a consistent pattern over many years of re-organization and reassignment of customer accounts from established and unionized depots to newly opened non-unionized locations, as the company expanded, with unionization of the new location following or not as the employees decided. For example, Barrie which as initially non-union took accounts from Toronto, which was unionized; Cambridge took over part of Hamilton’s work, and so on, as the company expanded from a single depot for the province. There is nothing fundamentally different in respect of the new Burlington depot.

11. The fact that this was a business decision, free of anti-union animus is acknowledged and no charge of unfair labour practice has been lodged. The union simply argued that it would be vulnerable in future, but this risk, if it seriously exists, is not a new one and the union has protection under the Act against improper motivation through an unfair labour charge.

12. There has been no erosion of the unit. Four persons transferred to Burlington from unionized locations may represent a temporary loss of union members but these are being replaced at those locations to cope with the new accounts coming from Masstron acquisition.

13. The Board has consistently stated that section 1(4) is intended to prevent the erosion of existing bargaining rights but that it cannot be used to expand existing rights or to circumvent the certification processes of the Act. (See *Dominion Stores Limited*, [1979] OLRB Rep. June 506). There has been no erosion here, as noted. Moreover, Masstron is *not* the successor employer, as the union asks us to declare in its application, Toledo is. No bargaining rights existed at Burlington under Masstron management and so there were no such rights to be protected when that company merged and ceased to exist as a separate entity. It is clear that the purpose of the application is not to protect the existing unit from erosion but rather to seek to expand it. In my view, the union must use the certification processes of the Act, or the direct and open negotiation of a voluntary recognition from the company to achieve its objective.

14. For these reasons, I would dismiss the application.

0345-87-R Labourers' International Union of North America, Local 506, Applicant v. Ming Sun Holdings Inc., Respondent

Bargaining Unit - Certification - Construction Industry - Whether persons employed to clean up scrap material in apartment building performing work of construction labourers - Clean up of scrap material that at one time may have been left over from construction work and clean up not done with reference to any specific renovation work not the work of construction labourers - Persons excluded from unit - Certificate issuing

BEFORE: Harry Freedman, Vice-Chair, and Board Members G. O. Shamanski and C. A. Ballentine.

APPEARANCES: David Strang and Pat Scaduto for the applicant; Brenda Kops and Geoffrey Lee for the respondent.

DECISION OF THE BOARD; December 2, 1987

1. The name of the respondent is amended to read: "Ming Sun Holdings Inc."
2. The Board convened a hearing in this matter to receive the representations of the parties with respect to the Labour Relations Officer's Report of September 3, 1987. By decision dated May 26, 1987, the Board authorized a Labour Relations Officer to inquire into and report back to the Board on the list and composition of the bargaining unit.
3. After receiving the representations of the parties, the Board recessed and then returned and made the following oral ruling:

In this application for certification, the applicant challenged five of the eight employees who the respondent asserts were employed in the bargaining unit on the application date.

Two of those five employees were employed at a recently completed building on Finch Avenue East where they were cleaning up debris left from the actual construction of the building and were cleaning an area in actual preparation for the installation of partitions. We indicated earlier today that those two employees were employed as construction labourers on the application date.

The other three employees being challenged by the applicant were at work at a building on Yonge Street. The respondent purchased that building in April 1987 and the employees in question were at work there on May 4, 1987, the date of the making of this application.

That building had been fully occupied, but when the respondent's employees were working there, the top two floors were vacant and the main floor was partially occupied.

The employees in question were cleaning up broken drywall, pieces of conduit, papers, broken acoustic ceiling tiles, broken furniture and other garbage. They placed that material in garbage bags and left the bags out for the municipal garbage pick-up.

In our view, while cleaning up debris left over from construction is the work of a construction labourer (see *PHI International Inc.*, [1980] OLRB Rep. Dec. 1789) we do not believe that the cleaning up of scrap material that, at one time, may have been left over from construction work is the work of a construction labourer. In this case, there was no actual construction, as that term is defined by the Act, taking place at the time the respondent purchased the building or when the employees in dispute were working there on the application date. We believe that the employees in question were simply cleaning up garbage, a cleanup not related, in any way, to construction work.

Counsel for the respondent also argued that the cleanup was done in preparation for renovation work and therefore was the work of a construction labourer. In *PHI Inc.*, *supra*, the Board held that cleanup work was the work of a construction labourer if that work was closely connected with a construction project.

We agree with counsel for the respondent who submitted that renovation work is construction work. See *Loblaws Groceteria Co. Ltd.*, [1969] OLRB Rep. June 392. However, the cleanup in this case at the Yonge St. building was not done with reference to any specific renovation work. Indeed, renovations were only planned for the second and third floor of the Yonge Street building and the evidence is clear that the employees spent a large amount of time doing cleanup of the parking garage where no renovation work was planned.

Counsel for the respondent relied on *PHI Inc.*, *supra*. In that case the Board wrote at page 1795:

"Pikula told the Board that he had arranged for a subcontractor to install architectural block in the lobby at 220-230 Woolner Road, but after making these arrangements was subsequently told by the contractor *that the dry wall would have to be removed before he could start*. Pikula had no persons on hand to undertake this task,

and went to a restaurant to see if he could find some casual labour...The individuals [casual labour] were to remove the stripping and dry wall at Woolner Road, and clean the wall underneath. While there, they also performed some general cleaning, and repaired a garage door. The building itself is 12 to 15 years old."

[emphasis added]

The Board held at paragraph 22 that the work described above was construction work. However, the cleanup described in *PHI Inc.* was necessary for the masonry work to be done, which was clearly renovation or construction work and was part of that overall renovation project.

Similarly, the floor scraping and other cleaning duties at the Finch Avenue East building performed by the two employees of the respondent who the Board earlier found to be construction labourers were also necessary and directly referable to the installation of partitions.

In our view, cleanup work in direct preparation for renovation is construction work if that cleanup is closely connected or directly related to the actual renovation work to be carried out. The evidence before us with respect to the Yonge Street building is far short of that. There was insufficient evidence linking the cleanup work done by the three labourers in question with the planned renovation work, other than the fact that renovations were planned after the cleanup was done. Therefore, we are satisfied that those three persons employed by the respondent at its Yonge Street building were not employed as construction labourers on the application date.

Having made that determination, we need not comment on the applicant's alternative challenge based on Mr. K. F. Lee's position as a shareholder and director of the respondent. The applicant claimed that he ought to be excluded from the bargaining unit by reason of section 1(3)(b) of the Act. See in this regard *Robin Hood Multifoods*, [1985] OLRB Rep. July 1159.

Therefore, based on the material filed and on our decision in this matter, we find that there were five employees in the bargaining unit on the date of the application.

4. After disposing of the issues raised in connection with the Labour Relations Officer Report, the Board proceeded to deal with the balance of the application for certification.

5. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on September 30, 1983, the designated employee bargaining agency is the Labourers' International Union of North America and the Labourers' International Union of North America, Ontario Provincial District Council.

6. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e) shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

7. The Board further finds, pursuant to section 144(1) of the Act, that all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

8. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on May 20, 1987, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

9. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

..., the Board shall certify the trade unions as the bargaining agent of the employees in *the bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

[emphasis added]

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 5 above in respect of all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

10. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all construction labourers in the employ of the respondent in all other sectors of the construction industry, excluding the industrial, commercial and institutional sector in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman.

2241-86-R The Society of Ontario Hydro Professional and Administrative Employees, Applicant v. **Ontario Hydro**, Respondent v. Canadian Union of Public Employees - C.L.C. Ontario Hydro Employees Union Local 1000, Intervener v. The Coalition to Stop the Certification of the Society, on behalf of certain objecting employees, and Tom Stevens, Objectors

Certification - Pre-Hearing Vote - Whether Board should deny request for pre-hearing vote due to complexity of bargaining unit issues involved - Pre-hearing vote denied due to applicant's position that it already had bargaining rights - Pre-hearing vote provisions analyzed

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *G. O. Shamanski* and *B. L. Armstrong*.

APPEARANCES: *Maurice A. Green*, *Darlene Booth* and *Kurt Johansen* for the applicant; *F. G. Hamilton*, *Karen Robinson* and *John West* for the respondent; no one for the intervener; *A. M. Robinson*, *J. A. Whatley*, *Peter Kirby* and *Stewart Crampton* for the Coalition to Stop the Certification of the Society; *Tom Stevens* in person.

REASONS FOR DECISION; December 21, 1987

1. This is an application for certification in which the applicant ("the Society") requested that a pre-hearing representation vote be conducted. In a decision dated March 17, 1987 (reported at [1987] OLRB Rep. Mar. 419, and referred to hereafter as "the show cause decision"), we directed that this matter be listed for hearing so that the Society could address concerns outlined in that decision and show cause why its request should not be refused. After hearing the oral submissions of the Society and the other parties with respect to the matters raised in our show cause decision, we ruled orally that we would not direct that a pre-hearing representation vote be conducted. We indicated then that our reasons for that decision would be delivered at a later date. We do that now.

2. The question we addressed was whether to direct a pre-hearing representation vote under subsection 9(2) of the *Labour Relations Act* ("the Act"). Section 9 of the Act provides as follows:

9.-(1) Upon an application for certification, the trade union may request that a pre-hearing representation vote be taken.

(2) Upon such a request being made, the Board may determine a voting constituency and, if it appears to the Board on an examination of the records of the trade union and the records of the employer that not less than 35 per cent of the employees in the voting constituency were members of the trade union at the time the application was made, the Board may direct that a representation vote be taken among the employees in the voting constituency.

(3) The Board may direct that the ballot box containing the ballots cast in a representation vote taken under subsection (2) shall be sealed and that the ballots

shall not be counted until the parties have been given full opportunity to present their evidence and make their submissions.

(4) After a representation vote has been taken under subsection (2), the Board shall determine the unit of employees that is appropriate for collective bargaining and, if it is satisfied that not less than 35 per cent of the employees in such bargaining unit were members of the trade union

at the time the application was made, the representation vote taken under subsection (2) has the same effect as a the representation vote taken under subsection 7(2).

The purpose of the pre-hearing vote procedure provided for in section 9 was described in *Emery Industries Limited*, [1980] OLRB Rep. Mar. 316:

5. It is axiomatic that in labour relations matters "time is of the essence"; but this is especially the case in respect of representation votes. If the trade union's certification application, and its status as bargaining agent, are not resolved expeditiously (i.e., if it cannot engage in collective bargaining, or perform the other representational functions for which it was selected) there may be discontent among its supporters and a possible erosion of that support. This might not only make the union's certification more difficult, but could also complicate its collective bargaining task. The purpose of the pre-hearing, or "quick vote" procedure is to facilitate a prompt resolution of representation questions, by permitting the Board to test employee wishes as soon as possible following the application date. This avoids the potential prejudice which might arise if a representation vote had to await a decision following a formal certification hearing. Some delay is inevitable, but the pre-hearing vote procedure is a legislative attempt to remove some of the problems, and prejudice, associated with delay while, at the same time, ensuring that all of the parties will be given a full opportunity to make their submissions with respect to any matters in dispute.

3. A quick vote will be a totally illusive ideal except in the most trivially simple of cases if the trade union status of the applicant, the description or composition of the appropriate bargaining unit, the list of persons employed in that unit on the application date, the qualitative and quantitative sufficiency of evidence of membership or any other issue of substance must be adjudicated before the vote is conducted. The provisions of section 9 recognize this. By describing the vote contemplated by section 9 as a "pre-hearing" vote, the Legislature recognized that the Board must be able to decide whether to conduct such a vote without having first to decide any issue in respect of which any person has the right to prior notice and the opportunity of a hearing. As the Board observed in *Kenting Earth Sciences Limited*, [1985] OLRB Rep. Feb. 293 at paragraph 8:

... A "pre-hearing representation vote" is precisely that: a vote conducted before any hearing is held to determine whether and to what extent the result of that vote should affect the rights of the parties. The Board has repeatedly noted that the expedition contemplated and intended by section 9 of the *Labour Relations Act* would be lost if the vote had to await formal adjudication of some contested issue in the guise of a preliminary matter: *The Board of Education for the City of North York*, [1984] OLRB Rep. July 989; *Satin Finish Hardwood Flooring (Ontario) Limited*, [1984] OLRB Rep. Nov. 1602, and the decisions cited therein. A hearing is conducted after the vote to determine whether effect should be given to the result.

4. The Board's response under subsection 9(2) to a request that a pre-hearing vote be conducted involves a decision about procedure, not substance. The procedural question is whether to gather up additional information about the wishes of employees to be represented by the applicant. The employees whose wishes would be tested in this way collectively constitute one or more voting constituencies, which may very well not be coextensive with the bargaining unit or units ultimately found appropriate by the board. The voting procedure can be designed to ensure that a vote of employees in that bargaining unit or units can, in effect, be retrospectively reconstructed from ballots cast by persons in the voting constituency or constituencies. The Board's discretion in defining a voting constituency is fettered only by its own assessment of the possible utility of a pre-hearing vote conducted in that constituency. If it appears to the Board that not less than 35 per cent of the employees in a voting constituency were members of the applicant at the time the application was made, the Board may conduct such a vote *before* entertaining the representations and evidence of the parties and other interested persons with respect to matters relevant to the disposition of the application and *before* determining whether and to what extent the results of that vote could or should be relied upon in dealing with the application.

5. Except in very simple cases, there will always be some risk that no use can ultimately be made of the results of a particular pre-hearing representation vote. Against that risk must be balanced the potential benefit of the quick vote, both in the case at hand and for the certification process generally. In the Board's view, the purpose described in the preamble to the Act is best served by making the section 9 quick vote procedure a real and workable option in the widest possible range of cases. As a matter of policy, the Board will not be quick to conclude that a pre-hearing vote should not be conducted because of a risk, however real, that no use could ultimately be made of the results. Generally, the Board would rather conduct a pre-hearing vote which might later prove useless than fail to conduct a pre-hearing vote which might have been useful.

6. The Society has not previously been found to be a trade union within the meaning of clause 1(1)(p) of the Act. The respondent and objectors deny that it is a trade union. The Society seeks certification with respect to a unit of what the respondent Ontario Hydro ("Hydro") would describe as "administrative, scientific and professional engineering employees" employed by Hydro in the Province of Ontario. One of the very uncommon characteristics of this application is that the applicant has dealt and continues to deal with Hydro on its members' behalf. Those dealings have resulted in certain "arrangements" or "agreements." Hydro takes the position that members of its management have participated in the Society's affairs, that the Society has received assistance from Hydro as a result of the aforesaid arrangements and that the Society therefore cannot be certified, even if it is a trade union, because section 13 of the Act prohibits certification of a trade union which has received employer support. The intervener ("Local 1000") represents a large unit of Hydro employees. Its interest is in the boundary between its unit and the unit applied for. Certain affected employees calling themselves The Coalition to Stop the Certification of the Society ("the Coalition") have intervened to oppose the Society's application and its request for a pre-hearing representation vote. They also say the Society is not a trade union and that it is the recipient of employer support.

7. In addition to their dispute about whether the Society is an organization which can be certified as a bargaining agent under the Act, the Society, Hydro and the Coalition were and are in dispute about the composition of the appropriate bargaining unit or units. The major areas of dispute were identified in paragraph 2 of the show cause decision:

... There is a dispute about whether "professional engineers" should form a separate unit and about how the determination of their wishes in that regard is to be made as required by subsection 6(4) of the Act. There are disputes about the inclusion or exclusion of other job categories by reason of their community of interest with other affected employees and about the application of clause 1(3)(a) of the Act, which is challenged by the applicant as contrary to the *Charter of Rights*. The applicant and respondent disagree about whether clause 1(3)(b) of the Act results in the exclusion from any appropriate unit or units of approximately 3,000 of the nearly 7,000 persons for whom the applicant seeks certification.

8. We could have structured a pre-hearing representation so as to facilitate subsequent reconstruction of a vote or votes in the appropriate unit or units, as we noted in paragraph 3 of our show cause decision:

3. If the union has the requisite appearance of support within such a constituency, as the applicant does in this case, the Board's ordinary response when there is a dispute over the composition of the appropriate bargaining unit is to strike a voting constituency which contains everyone who might later be found to fall within the appropriate bargaining unit and to segregate the ballots cast by any of those in that constituency who might not later be found to be in the appropriate unit: see *Carleton Roman Catholic Separate School Board*, [1986] OLRB Rep. Sept. 1200, at paragraph 8. In some cases, the number of persons whose ballots would be segregated is sufficiently great that it is administratively simpler and safer to segregate all ballots. That is what would be done here if we were to direct that a pre-hearing representation vote be conducted.

The applicant had the requisite appearance of support in a suitable voting constituency. The issue, therefore, was how to exercise the discretion implied by the use of the words "the Board *may* direct that a representation vote be taken."

9. After indicating in general terms that other matters raised by the parties would not by themselves have dissuaded us from directing that a pre-hearing representation vote be conducted, we identified in our show cause decision a particular concern which then inclined us against so doing. In addition to their submissions with respect to that concern, the parties opposed to the conduct of a pre-hearing representation vote also reiterated their arguments on those other matters and invited us to ground our decision on those arguments. It seems advisable to amplify our earlier rejection of those arguments before turning to the concern on which the show cause decision focused.

10. In the written representations they made to the Board prior to the show cause decision, Hydro and the Coalition took the position that the Board should not order a representation vote until the appropriate bargaining unit had been defined. Counsel for the Coalition put the point this way:

The Coalition continues to be of the firm opinion that an objective decision cannot be taken by the employees with regard to the application by the Society to be the certified bargaining agent until it is known who is to be included in the bargaining unit. In that connection, the meetings with you appear to have raised at least the following issues which will affect the composition of the bargaining unit:

- (a) as noted in the report, there is the question of whether or not a majority of the Professional Engineers will vote to be included in the bargaining unit pursuant to sections 6(4) of the Act;
- (b) there is the question with respect to the definition of a Professional Engineer and who is a Professional Engineer, under Section 6(4) of the Act;
- (c) there is the question of who is providing managerial functions and whether, even if persons are performing managerial functions under Section 1(3)(b) of the Act, such persons should be included in the bargaining unit, following the Charter argument raised by the applicant;
- (d) there is the question as to whether the approximately 270 employees in the Research Division should be included;
- (e) there is the question as to whether persons employed outside of Ontario should be included in the bargaining unit.

It is the Coalition's position that all of the above questions, and *not just* the question of whether Professional Engineers will choose by a majority to be included, make it impossible for an employee to determine the bargaining unit on which he is being asked to vote. Section 3 of the Act which guarantees the freedom of association contains within it the right of employees to know, with some degree of certainty with whom they are going to associate.

Counsel for Ontario Hydro put it this way:

The uncertainty as to status arising from the great number of challenged positions and persons, will render any vote conducted at this time very confusing. This complexity is magnified by the uncertainty as to which persons are "professional engineers" employed in a professional capacity as defined in *The Act* so as to ascertain their wishes to be part of a bargaining unit with non-professional employees. In such circumstances, it is imperative that employees voting as to trade union representation understand the scope of the bargaining unit so that the employees' perception of the eventual bargaining strength and desirability of trade union representation will be founded upon fact as to the structure of collective bargaining. This is especially relevant because

of a block of approximately 3000 professional engineers forms a substantial factor in the perception of the strength and structure in collective bargaining. Therefore, it must be a prerequisite that the inclusion or exclusion of professional engineers from the bargaining unit be decided prior to any representation vote being conducted.

Similarly, the inclusion or exclusion from any bargaining unit of some 3000 managers and supervisors based on the exercise of managerial functions or confidentiality in labour relations, raises substantial issues as to the bargaining power of the bargaining unit. If a substantial number of such challenged persons are either included or excluded, the perception of bargaining strength changes dramatically. Where the challenges form such a substantial portion of the potential bargaining unit, voters or the representational ballot must be made aware of the scope of the unit before being required to vote.

11. Counsel for Hydro also made the following argument with respect to the complexity of the proposed vote:

In deciding whether a meaningful or effective vote can be ordered at this time, consideration must be given to the vote being one of the most, if not the most, complicated, complex and expensive ever ordered by the Board. Over 150 different polling locations will be used. Over 69 days of Board Officer time together with equal commitment of effort by representatives of the parties will be devoted to the vote in addition to the time of over 6000 voters to attend the polls. The travelling expenses and living costs of persons overseeing the vote will be very substantial and possibly the highest ever experienced by the board. Unless the Board were confident that a vote will be required and can be conducted at this time in a manner that will not leave it open to challenge and necessitate a second vote at some later time, the Board ought not to routinely order a pre-hearing vote because of the inordinate amount of time, effort and expense required to conduct it.

The number of challenges based on managerial functions and confidentiality in labour relations is unprecedented in any pre-hearing vote. It has led the Board Officer to suggest that every ballot will be segregated. Such an unprecedented number of segregated ballots by itself demonstrates the impractical and unfeasible nature of any pre-hearing vote being conducted.

12. In support of these and other representations with respect to the exercise of our discretion to order a pre-hearing representation vote, the respondent and objectors cited the Board's decision in *Ontario Hydro*, [1980] OLRB Rep. June 882 ("the 1980 decision"). There, a trade union applied for certification with respect to a unit consisting of some, but not all, of the employees of Ontario Hydro in the bargaining unit then represented by CUPE Local 1000. The unit sought was not a craft unit, and the proposition that a subsection of an existing bargaining unit could be an appropriate unit flew in the face of the Board's strong presumption that an incumbent trade union's bargaining unit is the appropriate bargaining unit when an application is made to displace the incumbent in collective bargaining. In its decision, the panel noted that the existence of certain types of circumstances might lead the Board not to apply that presumption:

While there is a strong presumption in favour of the incumbent trade union's bargaining unit, the Board is willing to entertain evidence and submissions on why the status quo ought not to be maintained. The incumbent trade union may clearly have failed to represent a distinct and cohesive group adequately, a problem that has sometimes reared its head in the relationship of skilled and unskilled employees. This problem of unsatisfactory representation may be combined with a capacity in the employer to tolerate somewhat greater fragmentation, particularly if the smaller unit sought can meet the principles of appropriateness generally applied to certification cases. In the case at hand, the applicant indicated its intent to adduce evidence on the distinctive nature of Hydro's nuclear energy facilities; on the common training and conditions of employment of the affected employees; and on the manner in which they have been represented by CUPE Local 1000. The unit relied upon by the intervener and the employer is not one that the Board would normally grant and the intervener, itself, never had to organize all of the affected employees. Against this background, we are not prepared to say at this time that the applicant will be unable to make out a case justifying the unit it has requested. On the other

hand, the applicant's chances for success based on its answers to the Board's probing and against the background of all that we have reviewed above, cannot be characterized as substantial.

With respect to the element of inadequate representation it identified as central to any likely departure from the customary presumption, the panel (having conducted what amounted to a show-cause hearing) noted later in its decision that "counsel for the applicant did not give the Board the impression that it would be introducing unequivocal evidence of inadequate trade union representation by CUPE Local 1000" and that "the submission of counsel to the applicant on the reasons [for discontent with the incumbent's representation] did not appear to reveal the kind of 'strong and compelling' problem referred to by the Board in the 1973 *Hydro* case ... that would justify the carving up of an established collective bargaining relationship." The panel concluded it was so unlikely that the Board would find a subset of the existing bargaining unit to be an appropriate unit that it was not prepared to conduct a pre-hearing representation vote of employees in that subset.

13. Generally, arguments against conducting a pre-hearing representation vote are based on propositions of fact which are disputed by the applicant trade union. When there is a dispute about the generic composition of the appropriate bargaining unit, for example, the applicant trade union may have the appearance of support in a constituency which coincides with the unit it claims to be appropriate, but not in a constituency which sweeps in all those in the bargaining unit which the respondent employer claims is appropriate. If the facts as alleged by the applicant arguably support the unit it seeks, however, the Board will generally order a vote in a constituency corresponding to the unit sought, but defer any counting of ballots until after the bargaining unit dispute is resolved: *Satin Finish Hardwood Floorings (Ontario) Limited*, [1984] OLRB Rep. Nov. 1602; *Carleton Roman Catholic Separate School Board*, [1986] OLRB Rep. Sept. 1200. This approach is also taken when there is a dispute about the number and identity of persons employed in the appropriate bargaining unit on the application date, as the Board noted in *The Board of Education for the City of North York*, [1984] OLRB Rep. July 989 at paragraph 7:

The purpose of the pre-hearing vote procedure is to test the question of representation as quickly as possible after the application date. This avoids the prejudice which inevitably occurs when the conduct of a representation vote must await the determination of factual and legal issues which can only be resolved after a hearing in which each of the affected parties can participate. Often those disputed issues include the appropriate description of the bargaining unit, voter eligibility and employee status of challenged individuals. If the existence of such disputes could stand in the way of a pre-hearing vote, the procedure's efficacy would be destroyed. That is why the Legislature required only that the Board strike a voting constituency and prescribed as the vote prerequisite only that the applicant have the appearance of the requisite support within the voting constituency. (See generally *Emery Industries Limited*, [1980] OLRB Rep. March 316 at paragraphs 5, 6 and 7.) Where determination of the actual prerequisite level of support depends on a resolution of contested factual or legal issues, the Board assesses the appearance of support on the assumption that the union's position on the matters in dispute is correct. A pre-hearing vote is normally directed if, on that assumption, the requisite appearance of support is present. The contested issues are dealt with after the vote is held. However, the results of a pre-hearing vote are of no effect unless it is later demonstrated that not less than 35 per cent of the persons ultimately found to have been employees in the appropriate bargaining unit on the application date were members of the applicant on that date. If that demonstration depends on contested issues being later resolved in the applicant's favour, the Board will normally defer counting any ballots until it can resolve those issues which bear on the propriety of counting all, or any, of the ballots.

Put simply, a pre-hearing representation vote will generally be ordered, even though effect could not later be given to it if the facts alleged by other parties prove to be correct, so long as effect could later be given to it if the factual allegations of the applicant prove to be correct.

14. In our view, the significant feature in the application dealt with by the 1980 *Hydro* decision was that the applicant did not have the requisite appearance of support in any unit which the Board felt would have any substantial prospect of later being found appropriate *even if the applicant's allegations of fact were all true*. That was not a case in which the effectiveness of the vote would have depended simply on the applicant union's view of the facts prevailing over the view of those who opposed the application. Even on the applicant's view of the facts, there was no substantial likelihood that effect would be given to any vote which might be conducted.

15. This is not a displacement application. The proposition that there is an appropriate bargaining unit (or units) of at least some "administrative, scientific and engineering personnel" employed by Hydro does not fly in the face of any Board policy or presumption and is not in dispute. Nevertheless, the respondent and objectors rely on the 1980 decision for certain general comments about complex cases and, particularly, these observations found in paragraphs 24 and 25 of the decision:

With the proposed bargaining unit subject to substantial challenge, the votes of employees could well be dependent on the Board's view of the appropriate unit(s). For example, if the Board found that the appropriate unit would be on a facility by facility or complex by complex basis, employees may be less attracted to the applicant's representation. This approach could fragment the applicant's support and adversely affect an employee's perception of the applicant's eventual bargaining power. We have great concern over the reliability of ballots cast in the face of so much uncertainty over the very structure of collective bargaining by way of the applicant trade union.

....

As we have already observed, the pre-hearing vote procedure is designed to facilitate the certification process where the bargaining unit requested is relatively easy to ascertain and is clearly set out by the applicant. It is our opinion that an application as complex, as novel and as speculative as the instant application ought to have the appropriateness of the bargaining unit determined first and this is particularly the case where the affected employees are already participating in collective bargaining.

16. We are not comfortable with the assertion that the pre-hearing vote procedure is designed to facilitate the certification process only when the appropriate bargaining unit can be easily ascertained. As there can be no assessment of the relative merits of the parties' competing factual claims at the time a decision under subsection 9(2) is made, a test for ease in ascertaining the bargaining unit could only be satisfied at that stage if the respondent employer were in substantial agreement with the applicant union's position on that issue. We do not think that the availability of the pre-hearing representation vote to an applicant should depend on the degree to which the respondent employer is willing or able to agree or disagree with the applicant's positions. That approach would put a premium on the litigious imagination and undermine the policy approach to which we referred earlier in this decision.

17. Moreover, and with great respect to the panel which made the 1980 decision, we do not think it is appropriate to base a decision under subsection 9(2) on the notion that complexity of the then unresolved bargaining unit issue will make ballots "unreliable". While the choice an employee makes in casting a ballot may well be affected by his or her uncertainty about the composition or population of the unit for which an applicant may ultimately be certified, we do not see how such uncertainty would affect the "reliability" of the ballot cast. Ballots are surely reliable evidence of the voters' answers to the questions asked on them. In a representation vote (as opposed to a vote conducted under subsection (1), (4) or (5) of section 6 of the Act), the question asked is whether the voter wishes to be represented by the applicant trade union in his or her employment relations with the respondent employer. This question is unqualified by reference to the composi-

tion or population of the bargaining unit into which the voter might fall. The answer is, accordingly, equally unqualified. Membership evidence, on which applications for certification under section 7 are regularly determined without a vote, generally does not identify a bargaining unit of any particular composition or population. It is taken to speak to the wish of the applicant for membership to be represented by the trade union in any bargaining unit. If ballots are unreliable when cast before the appropriate bargaining unit's composition and population have been authoritatively determined, the same would be true of membership evidence as the basis for certification without a vote. Yet the Act very clearly contemplates certification decisions being made on the basis of the state of employee wishes as of a time prior to that at which the composition and population of the bargaining unit are determined. Indeed, subsection 6(2) of the Act even contemplates the Board's making a decision about certification before the composition and population of the appropriate bargaining unit have been determined. The proposition that expressions of employee wishes are unreliable as the basis for a certification decision unless made at a time when the composition and population of the bargaining unit are settled and known seems inconsistent with the provisions of the Act.

18. We are not aware of any decision of this Board (other than the one in question) in which the Board has suggested that the reliability of either ballots or membership evidence as a basis for a certification decision depends on whether employees knew (or could have correctly predicted) the Board's bargaining unit decision at the time they cast ballots or signed applications for membership. No such decisions were cited by any party to this application. No such decision was cited in the 1980 decision, and the concerns we have raised here appear not to have been raised or considered in that case. In our view, the result of the 1980 decision can be justified without reliance on that novel proposition.

19. It is not necessary to our analysis here to say that the existence or nature of a dispute about the composition or population of the appropriate bargaining unit could not in any case affect the use to which the Board might put ballots or membership evidence. We simply say that the notion found in the first of the two passages quoted in paragraph 15 above is not so settled or irrefutable as to warrant the Board's acting on it at a pre-hearing stage. If something about the potential voters' states of mind is said to be relevant to the use to which a pre-hearing vote might later be put, that is a matter which should more appropriately be dealt with after the vote is conducted.

20. The argument that ballots would not be reliable if cast before the bargaining unit issues are resolved is one of the arguments we had in mind when we said, in paragraph 4 of the show cause decision, that

By themselves, the complexity of the bargaining unit issues in this case and the resulting complexity of any pre-hearing representation vote would not, we think, be sufficient reason to refuse the applicant's request that a pre-hearing representation vote be conducted, nor would the very considerable cost to the Board of conducting such a vote.

We remained of this view after hearing the parties' oral arguments.

21. The consideration which ultimately did lead us to deny the request for a pre-hearing vote stemmed from the existence of the "agreement" between the Society and Hydro and the Society's position (expressed in answer to a question posed in a letter from the Registrar to the parties) that this agreement is a collective agreement. Our tentative assessment of the effect of these factors was set out in paragraphs 5 and 6 of the show cause decision:

5. It is common ground that for many years the applicant and its predecessors or precursors have been party to "agreements" with the respondent which speak to the terms or conditions of employment of persons in the unit for which the applicant seeks certification. These agreements

describe the applicant as "the representative body" for these persons, at least some of whom are conceded to be employees to whom the *Labour Relations Act* can apply. The respondent has expressed one of its several grounds for opposition to the request for a pre-hearing representation vote in these terms:

A prime factor causing the Board to exercise its discretion in ordering a vote prior to a hearing is not present in this Application. Usually the Labour Relations Board is concerned that delay in the Applicant (the Society) being able to exercise representational rights on behalf of employees will cause disinterest in and loss of support for an applicant trade union. Under the Society's current relationship with Ontario Hydro, *Ontario Hydro is prepared to permit the Society to continue to exercise its representational role in both negotiations of employment conditions and administration of policies and procedures including access to grievance and arbitration procedure.* Negotiations have been continuing for 1987 compensation improvement and a Mediator's Recommendations on Benefits received January 22nd, 1987, have been accepted by both parties. Salary determination, if unable to be agreed upon in direct negotiations, will be presented at Arbitration and an Award expected by March 10 will be final and binding for this year. *In all of the Board jurisprudence on this issue, this unique circumstance of a voluntarily recognized organization continuing to exercise its role in negotiations and related functions has never been considered nor ruled on by the Board.*

[emphasis added]

The respondent and the objecting employees both allege that the past and existing agreements between the applicant and respondent constitute employer support of the applicant which would disentitle it to certification by virtue of section 13 of the Act even if the applicant is a trade union as defined by clause 1(1)(p) of the Act, which they deny. The applicant claims that it is a certifiable trade union, and that its agreements with the respondent have been and are collective agreements within the meaning of the *Labour Relations Act*. The respondent denies that the agreements are collective agreements.

6. If the Board finds that the applicant is a certifiable trade union and if its current agreement with the respondent is a collective agreement, it appears it would follow that the applicant already has bargaining rights for employees in the unit for which it seeks certification, and no outcome of this application - and, hence, no outcome of a vote - could augment or diminish those existing bargaining rights. If, on the other hand, the applicant is not a certifiable trade union, then it can have no existing rights which are enforceable under the *Labour Relations Act* and no outcome of a vote could result in its having such rights. Unless the Board were to find that an employer and a union can contract out of the application to them of the *Labour Relations Act* and, further, that these parties actually did so without the applicant's thereby or thereafter having become uncertifiable, we have difficulty seeing how the applicant could be found to be a certifiable trade union without its existing agreement with the respondent being a collective agreement. While we have come to no firm conclusion on these points, we are led to wonder whether there is any possibility of an outcome of this application in which the results of a pre-hearing representation vote could have a meaningful part to play in the determination of the applicant's right to represent the employees affected by this application. We therefore doubt that we should grant the applicant's request that a pre-hearing vote be conducted.

22. At the hearing directed in our show cause decision, the parties were asked whether they could foresee an outcome of this application in which we could find the applicant to be a certifiable trade union (that is, a "trade union", as defined by clause 1(1)(p) of the Act, to which section 13 of the Act does not apply) without its agreement with Hydro being a collective agreement as defined by clause 1(1)(e) of the Act. The parties' answers tended to focus on the likelihood of a finding that the agreement is a collective agreement. For example, counsel for Hydro suggested that a finding that the applicant was a trade union on the application date would not necessarily mean it was a trade union when it entered into its agreement with Hydro. He observed that the Society's constitution was amended in November 1983, apparently with a view to the requirements of the Act, whereas the current Master Agreement was signed in September 1983 with effect as of July 1,

1983. Counsel for the applicant countered that it and Hydro had executed a further agreement after November 1983. This did not assist us with what we saw as the critical question, which may be restated this way: if the agreement is *not* a collective agreement, is there any likelihood that it does *not* constitute employer support within the meaning of section 13 of the Act? There was no serious challenge to the proposition that the Society receives very substantial benefits from Hydro pursuant to this agreement. Neither the Society nor any of the other parties argued with any vigour that the Society's existing agreement with Hydro might constitute *neither* a collective agreement *nor* employer support.

23. The doubt we expressed in our show cause decision remained after hearing the parties' oral representations. The applicant's position is that its agreement with Hydro is a collective agreement. That would mean it already has bargaining rights under the *Labour Relations Act* for the employees for whom it seeks certification. If that is so, certification can add nothing to its rights. (That is apart altogether from the question whether the existence of the agreement constitutes a bar under section 5 of the Act, an issue which has not been raised and which we are not yet in a position to assess.) Equally, dismissal of this application would not deprive it of such rights, as this is not a termination application. If the applicant is right, therefore, a representation vote would serve no useful purpose. The same is true if Hydro and the Coalition are right about the applicant's not being a certifiable trade union. Even if it "won" a vote, the Society could not be certified if it is not a certifiable trade union.

24. Still, we might have ordered a pre-hearing representation vote to cover the possibility that the agreement constitutes neither a collective agreement nor employer support, despite the reluctance of the applicant to describe this as a realistic possibility, if the conduct of such a vote would not have placed undue demands on the Board's resources. A pre-hearing representation vote in this case would have placed very considerable demands on the Board's resources, however. Nearly half of the officers in the Board's field staff would have to have done nothing but conduct multiple polls and multiple locations on a full-time basis every day for ten business days. This would have had a seriously adverse effect on the very important work of the field staff in connection with the hundreds of other matters before the Board at that time.

25. In summary, the combined effect of the applicant's position that it already had bargaining rights for the employees in question, the lack of support for or identification of circumstances in which a vote would be of any benefit in resolving the underlying issues and the very high cost of conducting such a vote led us to our decision that a pre-hearing vote would not be conducted in this application.

0666-87-R Labourers' International Union of North America, Local 527, Applicant v. Ottawa Structural Concrete Services Ltd., Respondent

Practice and Procedure - Related Employer - Sale of a Business - Board refusing to treat a letter as an application under sections 63/1(4) - Board's Rules requiring the filing of the proper forms to be complied with

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *D. A. MacDonald* and *J. Redshaw*.

DECISION OF THE BOARD; December 1, 1987

1. By letter from counsel dated November 17, 1987, the Operative Plasterers' and Cement Masons International Association, Local 598 ("Local 598") requests that the Board reconsider its decision dated October 15, 1987 in this matter by revoking the certificates granted to the applicant. Local 598 alleges that it was by operation of sections 1(4) and 63 of the *Labour Relations Act*, the bargaining agent for the employees affected by the application, and should therefor been given notice of and an opportunity to participate in, the proceedings, and further that there were no employees in the bargaining unit applied for on the date of application.

2. The Registrar is directed to schedule this matter for hearing for the purpose of hearing the evidence and representations of Local 598 and the parties to the application with respect to the issues raised by Local 598 in letters, from counsel, dated October 26 and November 17, 1987.

3. The November 17, 1987 letter concludes with the applicant requesting "that the Board treat this letter as an application for a declaration that there has been a sale of a business from Toronto Structural [Concrete Services] to Ottawa Structural [Services Ltd.] under section 63 of the Act and/or that they are related employers under section 1(4) of the Act" [sic]. Section 23 of the Board's Rules of Procedure directs that applications under section 63 of the Act be made in quadruplicate in Form 26. Section 27 of the Board's requires that an application under section 1(4) of the Act be made in quadruplicate in Form 31. While section 31 of the Board's Rules stipulates that nothing in sections 27 to 30 of the Rules presents an applicant from claiming relief under section 1(4) of the Act in any other proceeding under the Act, the requisite notice and particulars must still be provided. The Board's Rules are there to be followed. The provisions of sections 1(5) and 63(13) of the Act are such that it should not be especially difficult for an applicant seeking section 1(4) or section 63 relief (respectively) to provide sufficient particulars. We are not satisfied that the applicant has either provided sufficient information or provided it in a form which permits the Board to accept its letter of November 17, 1987 as an application under either section 1(4) or section 63. The Board does not have unlimited resources and cannot be expected to use the resources it does have to try to extract the relevant particulars from, in this case, 2 letters in order to give the requisite notice to the employers and employees involved. If Local 598 does file applications under sections 1(4) or 63 of the Act, the Registrar is directed to schedule them to be heard together with Local 598's request for reconsideration at which time the Board will entertain the evidence and representations of the parties with respect to all matters arising out of and incidental to the application(s).

0853-87-R Ontario Secondary School Teachers' Federation, Applicant v. The Peel Board of Education, Respondent

Bargaining Unit - Certification - Appropriate to place secondary panel occasional teachers in a separate bargaining unit from elementary panel occasional teachers - Degree of interchange between the two panels and fragmentation of workforce factors to be considered - Certificate issuing

BEFORE: *Robert D. Howe*, Vice-Chair, and Board Members *R. M. Sloan* and *H. Peacock*.

APPEARANCES: *Maurice Green*, *Malcolm Buchanan*, *Joan Farrell*, *Ed Bergey* and *John Black* for the applicant; *Carl W. Peterson* and *Martin A. Fowler* for the respondent.

DECISION OF THE BOARD; December 8, 1987

1. In a decision dated July 22, 1987 in this matter, another panel of the Board directed that a pre-hearing representation vote be taken and that the ballot box be sealed and the ballots not counted pending determination of the parties' dispute over the composition of the appropriate bargaining unit. The representation vote was taken on September 24, 1987 and the ballot box was sealed in accordance with the Board's direction.

2. When this matter came on for hearing before the present panel of the Board on November 6, 1987, counsel for the applicant and counsel for the respondent confirmed that the description of the bargaining unit was the sole issue in dispute between the parties. After hearing and recessing to consider the submissions of counsel with respect to that issue, the Board made the following oral ruling:

Having duly considered the able submissions of counsel for the applicant and counsel for the respondent, we are unanimously of the view that the bargaining unit sought by the applicant (i.e., all occasional teachers of the respondent in its secondary panel in the Regional Municipality of Peel) is an appropriate unit for collective bargaining. As acknowledged by counsel for the respondent, the Board has a well-established practice of placing secondary panel occasional teachers in a separate bargaining unit from elementary panel occasional teachers. As noted by the Board in *The Board of Education for the City of Toronto*, [1983] OLRB Rep. Feb. 273, in paragraph 21, "[t]he historical dichotomy between elementary school teachers and secondary school teachers is reflected in the special legislation which governs collective negotiations between Boards of Education and 'contract' teachers (i.e., the *School Boards and Teachers Collective Negotiations Act*)". The Board's decisions in this area have mirrored that approach, which, as further noted in the *Toronto* case, is consistent with the Board's practice of describing bargaining units of part-time employees (who are somewhat analogous to the employees affected by this application) in a fashion which mirrors the description of their full-time counterparts. There is a greater degree of interchange between the two units in this case than there was in the *Toronto* case. Of the 283 persons who have taught in the secondary panel as occasional teachers in the 1986-87 school year, 142 have also taught in the elementary panel as occasional teachers. However, a review of the number of days taught by them in each panel indicates that an overwhelming majority of them teach primarily in one panel or the other. Moreover, of the 632 persons who taught

as occasional teachers in the elementary panel during the 1986-87 school year, 490 taught only in that panel. Thus, there was no interchange in respect of that very substantial group of occasional teachers. Although the degree of interchange between the two panels is a factor to be considered, as is the fragmentation of the respondent's workforce which is already divided into seven bargaining units, the need for an element of certainty in this already complex area must also be considered. It is evident that the applicant, and other trade unions which organize in this field, have relied upon the Board's well-established practice in this area in carrying on their organizational activities. Indeed, as noted by counsel for the applicant, in a letter dated July 20, 1987, the Ontario Public School Teachers' Federation advised the Board (through its Registrar) that it is in the process of organizing the elementary occasional teachers employed by the respondent. Finally, we would note that granting the bargaining unit requested by the applicant will not automatically lead to a reduction in the size of the pool of occasional teachers whom the respondent will be able to call upon to meet its staffing needs in respect of the secondary panel. If this application succeeds, it will be open to the parties to negotiate provisions regarding seniority and staffing which are tailored to meet their particular circumstances.

For the foregoing reasons, the Board, in the exercise of its discretion under section 9(4) of the Act, hereby determines that all occasional teachers of the respondent in its secondary panel in the Regional Municipality of Peel constitute a unit of employees of the respondent appropriate for collective bargaining. The phrase "occasional teacher" has the meaning assigned to it by clause 1(1) ¶31 of the *Education Act*, R.S.O. 1980, c.129, as amended.

We are further satisfied that not less than thirty-five per cent of the employees in that bargaining unit were members of the applicant at the time this application was made.

The Board hereby directs that the ballot box shall be unsealed and that the ballots cast in the pre-hearing representation vote which has been conducted in respect of this application shall be counted.

4. No statement of desire to make representations has been filed with the Board within the time fixed under subsection 3 of section 70 of the Board's Rules of Procedure following the counting of the ballots pursuant to that direction.

5. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

6. On the taking of the pre-hearing representation vote directed by the Board more than fifty per cent of the ballots cast were marked in favour of the applicant.

7. A certificate will issue to the applicant.

8. The Registrar will destroy the ballots cast in the pre-hearing representation vote taken in this matter following the expiration of thirty days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such thirty-day period.

1926-87-R Quaker Oats Employees Independent Union (Cereals), Applicant v. The Quaker Oats Company of Canada Limited, Respondent v. United Food and Commercial Workers Local 293, Intervener

Certification - Practice and Procedure - Pre-Hearing Vote - Reconsideration - Alleged transfer of bargaining rights between locals after certification application filed - Successor rights application concerning the transfer pending before the Board - Whether alleged successor local should be on the ballot

BEFORE: *Judith McCormack*, Vice-Chair, and Board Members *G. O. Shamanski* and *P. V. Grasso*.

DECISION OF THE BOARD; December 16, 1987

1. This is an application for certification in which the applicant requested a pre-hearing vote. A dispute arose with respect to whether the name of the United Food and Commercial Workers International Union, Local 1230-10 ("Local 1230-10") or the name of the United Food and Commercial Workers International Union Local 293 ("Local 293") should be on the ballot. By a decision dated November 10, 1987, the Board directed that the name of Local 1230-10 be on the ballot rather than that of Local 293. Since that time, Local 293 has applied for reconsideration of that decision by the following letter:

Please be advised that we have been retained to act on behalf of Local 293 of the United Food and Commercial Workers in the above matter.

We have just had the opportunity to review the decision of the Board in the above matter, dated November 10, 1987. This letter constitutes a request that the Board reconsider this decision. We request reconsideration for the following reasons.

Firstly, it is Local 293 of the United Food and Commercial Workers which is the incumbent union, and not Local 1230-10. It is Local 293 which presently represents the employees for the purpose of collective bargaining.

Secondly, at the meeting with the Labour Relations Officer on November 4, 1987, all of the parties agreed that Local 293 would be named and appear on the ballot. This was in part the basis for the incumbent trade union agreeing to some of the other matters which were discussed on that day. Furthermore, the incumbent trade union has relied on this agreement that Local 293 would appear on the ballot for the purpose of campaigning. It is our position that in the event that the name of Local 293 does not appear on the ballot, the incumbent trade union will be substantially prejudiced and irreparably damaged.

Thirdly, it would appear that the Board issued its decision of November 10, 1987 without first receiving submissions from the parties, or providing the parties with an opportunity to either make submissions or call evidence.

Accordingly, it is our position that the name of Local 293 ought to appear on the ballot for the election scheduled for Thursday, November 19, 1987.

In light of the substantial prejudice and irreparable damage that will be suffered by the incumbent union in the event that the name of Local 293 does not appear on the ballot, we would accordingly request that prior to such an election taking place, the Board schedule an oral hearing to permit the incumbent trade union to make full submissions and call evidence. Unless the name of Local 293 is to appear on the ballot, it is imperative that this occur *prior* to any election taking place. Therefore, it may be necessary to postpone the election scheduled for November 19, 1987.

In the alternative, and in the event that the Board denies the above requests, we would request that the ballot boxes be sealed pending a hearing on the above and all related matters.

The Board advised the parties by telegram that the request for reconsideration had been dismissed and that reasons would follow. We now provide those reasons.

2. Turning first to the argument that the Board made its decision without a hearing to receive the parties' evidence and submissions, the Board has noted on a number of occasions that implicit in the concept of a pre-hearing vote is the idea that a vote will be taken before any hearing is held (*The International Nickel Company of Canada*, [1961] OLRB Rep. Dec. 324). The reasons for this are self-evident. The purpose of a pre-hearing vote is to provide a "quick vote" procedure, unobstructed by the kinds of delays often attendant upon the litigation and resolution of issues which may be in dispute between the parties. As the Board said in *Emery Industries Limited*, [1980] OLRB Rep. March 316:

5. It is axiomatic that in labour relations matters "time is of the essence"; but this is especially the case in respect of representation votes. If the trade union's certification application, and its status as bargaining agent, are not resolved expeditiously (i.e., if it cannot engage in collective bargaining, or perform the other representational functions for which it was selected) there may be discontent among its supporters and a possible erosion of that support. This might not only make the union's certification more difficult, but could also complicate its collective bargaining task. The purpose of the pre-hearing, or "quick vote" procedure is to facilitate a prompt resolution of representation questions, by permitting the Board to test employee wishes as soon as possible following the application date. This avoids the potential prejudice which might arise if a representation vote had to await a decision following a formal certification hearing. Some delay is inevitable, but the pre-hearing vote procedure is a legislative attempt to remove some of the problems, and prejudice, associated with delay while, at the same time, ensuring that all of the parties will be given a full opportunity to make their submissions with respect to any matters in dispute.

The expedition which is integral to a pre-hearing vote would be lost if the Board began to hold hearings before the vote is taken *Satin Finish Hardwood Flooring (Ontario) Limited*, [1984] OLRB Rep. Nov. 1602 and *Kenting Earth Sciences Limited*, [1985] OLRB Rep. Feb. 293.)

3. At the same time, the Board recognizes that the parties are entitled to a hearing on contested issues which may arise between them. To accommodate the need for expedition and also provide the parties with an opportunity to call evidence and make submissions, the scheme of section 9 contemplates the deferral of decisions on contentious matters until after the vote is held (*Kirouac Contracting Limited*, [1987] OLRB Rep. Oct. 1262.) In these circumstances, the Board will attempt to ensure that the vote will be useful in any event of the dispute by segregating ballots or otherwise structuring the vote to this end. After the vote is conducted, a hearing is held to determine the matters in dispute. Occasionally, as in this case, issues arise which must be determined before the vote because they relate to the manner of taking the vote. In these circumstances, the parties will put their positions to the Labour Relations Officer appointed by the Board to conduct the pre-hearing vote meeting, and they will be included in the officer's report to the Board. Infrequently, the parties will also request the opportunity to make written submissions before the vote. In this case, no such request was made, and all parties were apparently content to put their positions to the officer at the pre-hearing vote meeting in the knowledge that the Board would have to make a decision on the structure of the ballot before the vote. Local 293 now takes the position that the parties were in agreement that Local 293 should be on the ballot. That is not the case that was put to the Board. If Local 293 wishes to maintain that there was an agreement at the officer's meeting which should play a role in the Board's decision, it will have the opportunity to do so after the vote, and the Board will determine the matter in the manner described above. However, at this point, it is clear from the submissions that both the question of whether Local

293's name should be on the ballot and the assertion that there was an agreement to this effect are in dispute.

4. Whether or not Local 293 could have or should have availed itself of the written submissions procedure, the problem here is more substantial, that is, that the nature of the ballot itself is affected by a dispute that cannot be determined without a hearing. In these circumstances the Board has two choices; it can exercise its discretion to decline to order a pre-hearing vote at all (and thus transform the application from one involving a pre-hearing vote to a "regular" application), or it can structure a vote with the risk that it may not ultimately prove to be useful to the Board, depending on the outcome of the successor rights issue. If the Board decides to order the vote, it must choose which name should be on the ballot, again without knowing which party's position will eventually prevail. As we stated in our earlier decision, this is not an appropriate case for two ballots, particularly in light of the similarity in names.

5. In this case, on balance we found that the option of ordering the vote and structuring the ballot in accordance with the applicant's position to be most appropriate for a number of reasons. Local 293 conceded that at the time this application was filed, Local 1230-10 had the bargaining rights in question. The alleged transfer of bargaining rights to Local 293 took place after the filing of the applicant's application. Local 293 has applied to the Board for a declaration that it is the successor to Local 1230-10 bargaining rights; that application (Board File No. 2113-87-R) is currently pending before the Board. What Local 293 seeks is to have the Board act as if such a declaration had already been obtained. The Board has declined to do this in the past in similar circumstances (*Wire Rope Industries Ltd.* [1987] OLRB Rep. Oct. 1336.) In addition, if we were to allow a pre-hearing application to be transformed into a regular application in these circumstances, it would leave an applicant vulnerable to the manufacturing of disputes by other parties, designed in part to defeat the application by drawing on the higher level of membership evidence required in a regular application. We hasten to point out that there was no suggestion that Local 293's conduct was motivated by such considerations in this case. Nevertheless, we did not think it advisable to decline to order a vote to which an applicant would otherwise be entitled because events created by an intervener since the date of the application caused some uncertainty in the nature of the ballot.

6. It also made sense to us that the Board be particularly cognizant of the applicant's views in setting up the ballot. It is the applicant which has chosen the expeditious pre-hearing vote process, and in light of that choice, it is reasonable to assume that expedition is of some importance to it. If the applicant's position is ultimately found to be wrong, the result may well be another vote at some point later in time. In other words, the applicant will have lost the advantage of the "quick vote" procedure. As a result, we found it reasonable that the applicant's position should figure highly in the Board's considerations at this point, given the special impact upon it of the risks involved. This approach is also consistent with the Board's treatment of bargaining unit disputes on pre-hearing votes (*Satin Finish*, supra.)

7. We understand the argument that Local 293 is the incumbent in this matter to be a reiteration of the legal position that Local 293 is the successor to Local 1230-10's bargaining rights, rather than an assertion that Local 293 was actually the signatory to the expiring collective agreement in this matter. However, the question of whether Local 293 is the successor to the bargaining rights of Local 1230-10 is precisely the issue which is in dispute between the parties. Thus, the characterization of Local 293 as the incumbent in the manner set out above does not provide us with any assistance in determining which name should be on the ballot at this point, since Local 293's position is predicated on a resolution of that dispute in its favour. That resolution, whether favourable to Local 293 or not, will only take place after the vote. There is an obvious risk in selecting

Local 1230-10's name for the ballot, that is, that the vote results may not be useful to the Board. On the other hand, the course of action urged upon us by Local 293 carries an almost identical risk. At the same time, we are not convinced that irreparable damage will be caused by directing the vote as we did. If Local 293 is eventually found to be the successor to Local 1230-10's bargaining rights, it will be open to Local 293 to make submissions as to what steps should then be taken, including the possibility of holding another vote. Whether or not some tactical advantage may be lost with respect to Local 293's campaign, there is no guarantee that the delay attendant upon a determination of the successor rights issue prior to the vote would not have the same effect on one or more of the parties, including Local 293.

8. This application for reconsideration is dismissed.

1021-87-M United Food and Commercial Workers International Union, AFL:CIO-:CLC, Applicant v. Royal Mattress Limited, Respondent

Employee Reference - Employee terminated for alleged theft one month prior to application under section 106(2) - Applicant's submission that Board ought to determine person's duties as of the date of filing of the application for certification rejected - Officer's appointment cancelled - Matter adjourned *sine die*

BEFORE: *Robert Herman*, Vice-Chair, and Board Members *G. O. Shamanski* and *R. R. Montague*.

DECISION OF THE BOARD; December 24, 1987

1. In a prior decision in this application under section 106(2) of the *Labour Relations Act* (1987 OLRB Rep. October 1302), the Board appointed a Board Officer to enquire into the duties and responsibilities of the disputed individual, Norman Tremblay, and to report back to the Board. That appointment had been opposed by the respondent employer on the basis that the applicant had agreed during the certification process that Tremblay was not an "employee". Notwithstanding that submission, the Board appointed an officer.

2. Subsequent to the issuance of the prior decision, the respondent forwarded further submissions to the Board, raising a new ground of objection to the Officer's appointment, submitting that Tremblay had been terminated on May 20, 1987, approximately one month prior to the filing of the instant application. In these latter submissions, the respondent asked that the application be dismissed, as no "question arises as to whether a person is an employee ..." within the meaning of section 106(2) of the Act in circumstances where the individual in question was not employed by the respondent on the date of the application.

3. In response to these submissions, the applicant union noted that Tremblay was terminated by the respondent on May 20, 1987, for alleged theft. The applicant submits that the Board ought to determine Tremblay's duties and responsibilities as of the date of filing of the application for certification, not the instant application, which occurred on April 2, 1987. The union also takes the position "Mr. Tremblay is temporarily removed from the company payroll until such determination is made in the Courts surrounding his alleged theft. It is also the applicant's position that should Norm Tremblay be found innocent, he should be reinstated with full compensation and

seniority which would then mean that Mr. Tremblay would not have been out of the employment of Royal Mattress Manufacturing Company.” The submissions forwarded by the union indicate that no collective agreement has yet been negotiated between the parties. In subsequent correspondence, the union also argued “that the Board should not allow employers the opportunity to terminate employees and then take the position that on the date of application they were not employed by the respondent”.

4. Section 106(2) of the Act reads as follows:

(2) If, in the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee or as to whether a person is a guard, the question may be referred to the Board and the decision of the Board thereon is final and conclusive for all purposes.

5. In order to appoint an officer to conduct an inquiry and report back to the Board, with the attendant costs to the parties and drain on Board resources, the Board must be satisfied that “a question arises as to whether a person is an employee ...”, within the meaning of the Act. In the instant case, at the time this application was filed the individual in question was not an employee of the respondent. It may well be that an adjudicative decision, or a negotiated resolution between the parties, may determine that Tremblay was an employee of the respondent when this application was filed. Until that time however, there does not appear to be any question with respect to Tremblay’s status as an “employee”, as both parties agree that at the time of filing of this application Tremblay was not employed by the Company. In these circumstances, the Board considers it appropriate to cancel the Board Officer’s appointment as set out in our prior decision, and to adjourn this matter *sine die* for a period of one year from the date of this decision. Should Tremblay’s status as an employee of the respondent be resolved within that period, either party can forward a request to the Board that it further consider this matter. Although we need not decide at this stage, if Tremblay is not ultimately found to have been an employee of the respondent on June 18, 1987, the date on which this application was filed, the Board will likely dismiss this application. Alternatively, if Tremblay is found to have been such an employee on that date, the Board will likely appoint an officer to inquire into his duties and responsibilities.

6. If no request to further consider this matter is received within the one year period as set out above, this matter will be automatically terminated.

0292-87-R Joan Timothy, Applicant v. London and District Service Workers’ Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., Respondent v. Strathroy Nursing Homes Limited, Intervener

Representation Vote - Termination - Voter eligibility rules reviewed - Employee “on the payroll” in the sense of using up vacation entitlement and sick pay credits before formally retiring not eligible to vote - Fact that employee continued to have union dues deducted from pay not detracting from that conclusion - Applicant involved in a car accident and not able to vote - Board denying her another opportunity to vote - Ballots ordered counted

BEFORE: Owen V. Gray, Vice-Chair, and Board Members D. A. MacDonald and J. Redshaw.

DECISION OF THE BOARD; December 14, 1987

1. This is an application under section 57 of the *Labour Relations Act* ("the Act") for termination of bargaining rights. At the conclusion of a hearing on June 1, 1987, the Board directed that a representation vote be conducted in accordance with subsection 3 of that section. The parties then met and agreed that the vote should be conducted at the workplace on June 16, 1987. The Board gave the employees notice of the arrangements agreed to by the parties, and conducted the vote that day in accordance with those arrangements. There were nine persons named on the voters list prepared by the parties. All of them attended to vote except the applicant, Joan Timothy. The ballot box was sealed and the ballots not counted, pending resolution of two issues which had arisen in the meantime: whether June Robinson, whose ballot was segregated, was eligible to vote and whether special arrangements should be made to give Joan Timothy an opportunity to cast a ballot on another date. Those issues are dealt with in this decision.

2. The facts are not in dispute.

June Robinson

3. In May 1987, June Robinson expressed an intention to retire from her employment with the intervener. A retirement brunch was held during that month for her and one other employee. She was allowed to use up her five weeks' vacation entitlement and her sick pay credits before formally retiring. She began doing that on June 1, 1987, having ceased work at the end of May. She did not perform work for the intervener thereafter, nor was it expected that she ever would. When she attended to vote she was in the process of using up her vacation credits. She was "on the payroll" until July 15, 1987. Between June 1 and July 15, 1987, she remained on the seniority list, had union dues deducted from her pay and made claims for health benefits.

4. The decision directing the vote described eligible voters in the then customary language:

All employees employed in [the bargaining] unit on June 1, 1987, who have neither voluntarily terminated their employment nor been discharged for cause between that date and the date the vote is taken will be eligible to vote.

The Board has consistently interpreted a direction in this form to mean that a person must be an employee in the bargaining unit on both the initial eligibility date and the date the vote is taken in order to be eligible to vote: *Canadian Westinghouse Company Limited*, [1966] OLRB Rep. Sept. 372; *London District Crippled Children's Treatment Centre*, [1980] OLRB Rep. Apr. 461; *Lapalme Nursing Home Ltd.*, [1987] OLRB Rep. Mar. 406.

5. The issue in *London District Crippled Children's Treatment Centre*, *supra*, was whether a person employed in the unit on the initial eligibility date and actually at work on the date the vote was taken was eligible to vote, even though she had given notice one day before the vote was taken of her intention to terminate her employment two days later and had in fact left her employment on the day after the vote was taken. The Board found that she was eligible to vote if she was actually at work on the date of the vote, regardless of the length of time she intended or expected to remain employed after that date. The decision provided the following useful review of the Board's approach to voter eligibility:

17. The line which the Board has traditionally drawn respecting the eligibility of employees to vote, namely that the employee be in the bargaining unit both on the date that the vote is ordered (or on the terminal date in a pre-hearing vote or as otherwise agreed by the parties) and on the date the vote is taken, is clear and well known through the Board's published decisions, its practice notes (see Practice Note No. 9, August 1964) and its layman's handbook. While originally the Board merely stated that employees in the bargaining unit would be entitled to vote (see e.g., *The Borden Co. Ltd.*, (1946), 46 CLLC ¶16,461) it evolved the two-pronged eligibility rule to give greater clarity and certainty to voter's lists, as well as to eliminate the possibility of

an employer influencing the outcome of a vote by hiring new employees. The Board's practice and the principles underlying it were well canvassed in *J. McLeod & Sons Ltd.*, [1970] OLRB Rep. Feb. 1316.

18. In this case the respondent and the objecting employees invite the Board to adopt a different rule. They submit that if an employee has indicated an intention to leave the workplace he or she should not be permitted to influence the outcome of a representation vote. When pressed on the point, however, they are less than clear as to how that principle can be applied in any general way. Is an employee to be deprived of his franchise if, before a representation vote, he indicates an intention to leave his employment within three weeks of the vote? Or three months? Or six months? And is the result of a closely contested vote to be disturbed if an employee who voted is transferred, quits or is discharged within a day or two after the vote? The Board must obviously adhere to a rule that gives some certainty and finality to the granting of bargaining rights and which can be readily understood and applied by the parties.

19. The Board's past decisions give considerable guidance in the application of the rules regarding the eligibility of employees to vote in the selection of a bargaining agent. Employees on lay-off without a definite date of recall have been held ineligible to vote (*Rix Athabasca Uranium Mines Limited*, [1961] OLRB Rep. July 127.) The Board has found that a person who was an employee in the bargaining unit on the date the vote was ordered and was promoted to acting foreman on the date the vote was taken was ineligible to cast a ballot, notwithstanding that he later returned to the bargaining unit (*Success Display Limited*, [1971] OLRB Rep. Oct. 636). An employee who was absent on Workmen's Compensation on the date the vote was ordered and on the date the vote was taken, but who had neither quit nor been terminated was found eligible to vote (*Alex's Plumbing and Heating Limited*, [1970] OLRB Rep. Feb. 1321). Where, on the other hand, an employee who was absent due to illness had been treated in all respects as terminated and had no real prospect of returning to work, the Board concluded that he was not eligible to vote (*Canac Kitchens Ltd.*, [1978] OLRB Rep. Aug. 723).

20. The Board's rule respecting eligibility to vote has sought to strike a balance. On the one hand the Board recognizes the interest of employees with a stake in future collective bargaining having a controlling voice in the choice of a bargaining agent. On the other hand it faces the necessity of establishing a democratic process with some finality in situations where employees are subject to varying degrees of turnover. From the Board's earliest days employees were not removed from the voter's list unless they had left their employment before the taking of the vote. The only recorded exception to this appears to have been in wartime: under P.C. 1003, the *Warime Labour Relations Regulations*, the Board's practice was to exclude from voting eligibility an employee who prior to the taking of the vote had obtained a separation notice pursuant to Selective Service regulations. An employee subject to that irrevocable step was viewed as no longer sufficiently interested in employment relations in the plant to be entitled to influence the outcome. (*Packard Electric Co. Ltd.* (1944), 46 CLLC ¶16,424). There appears to be no other recorded variation from the Board's rules.

21. The Board's voter eligibility rules are not intended and do not purport to achieve a standard of perfect decimal point democracy, assuming such a standard can ever be achieved. The rules seek nothing more than to establish a substantially representative group of employees with a minimum of employment continuity for the purposes of certification. Any deliberate attempt to manipulate the eligibility rules and temporarily "pack" the voting constituency to influence the outcome of the vote can be dealt with through the Board's remedial authority in unfair labour practices (see, e.g. *Custom Aggregates*, [1978] OLRB Rep. Mar. 215). Any distortion in the selection process caused by a planned and *bona fide* substantial increase in the size of the bargaining unit in the near future can be accommodated by the application of the Board's build-up principles (*Emil Frant* 57 CLLC ¶18,057; *McCord Corporation* [1965] OLRB Rep. June 203; *Domco Foodservices Limited*, [1980] OLRB Rep. Jan. While the Board deals with these kinds of substantial changes in the bargaining unit, it cannot concern itself with the inevitable fact that some employees who are eligible to vote may have a more temporary or transitory interest in their jobs than others.

22. The Board has long recognized the right to vote of employees who are transitory, so long as they conform to the minimum requirement of the Board's two-pronged eligibility rule. If they are employed on the date the vote is ordered and continue to be employed to the date the vote

is taken, they are entitled to vote. In *J. McLeod & Sons*, [1969] OLRB Rep. Dec. 1100, the Board confirmed the eligibility to vote of a group of employees who fell within the eligibility dates but who in fact had been hired temporarily. They were strikers from a nearby plant who expected to return to their normal employment at some indefinite future date. And in *University of Toronto*, [1974] OLRB Rep. May 267, the Board confirmed the right to vote of all teaching assistants and research assistants employed by the University even though the vote was conducted in May, at the end of the academic year, and a turnover rate of 25 per cent to 35 per cent of the bargaining unit was projected for the next academic year.

23. The selection of a bargaining agent under the Act cannot be conducted on the basis of an ongoing referendum geared to the daily, weekly or monthly changes in the people who make up a bargaining unit. But bargaining rights are not necessarily permanent, and the Act allows for shifts in the wishes of employees whether through the turnover of personnel or otherwise. Any changes in the sentiment of a majority of the employees about union representation over time can be dealt with through the provisions of the Act for the termination of bargaining rights.

6. Ms. Robinson's particular situation is not addressed in any decision to which we were referred, nor any of which we are aware. Counsel for the employer argues that since her "employment status" did not change until July 15th, she should be treated as having been an employee at all relevant times for the purpose of the vote; her intention to retire should have no more effect than did the intention to quit of the employee whose eligibility was dealt with in *London District Crippled Children's Treatment Centre*, *supra*. Counsel for the union says the distinction between that case and this one lies in the fact that Ms. Robinson was not at work on either of the relevant days. He argues that her position on those days was like that of an employee on indefinite layoff with no real prospect of returning to work. He made reference to the following decisions dealing with eligibility to vote of employees on layoff: *Canac Kitchens Ltd.*, [1978] OLRB Rep. Aug. 723; *SGS Supervision Services Inc.*, [1982] OLRB Rep. Jan. 105; and, *Hurdman Bros. Limited*, [1983] OLRB Rep. Feb. 238.

7. As the decisions cited indicate, and as one would expect, decisions about a person's eligibility to vote turn on the actual substance of that person's relationship with the employer at the relevant time, not on the form in which they have structured it or the language they have chosen to describe it. The mere fact that someone is "on the payroll" is not conclusive that he or she is an employee for these purposes. The Board's general approach to the issue is clear. If the person in question is or would be an employee (as opposed to independent contractor or volunteer) when performing work for the employer, then the nature of the Board's assessment of whether a person was employed on a particular day depends on whether that person was actually performing work for the employer on that day. If so, then it naturally follows that he or she was an employee on that day, whatever may have been the expectation as to other days. If he or she did not perform work for the employer on the day in question, the person will be considered to have been an employee on that day for these purposes only if he or she had performed work for the employer prior to that day and was then expected to do so again at some time thereafter.

8. Ms. Robinson was not performing work for the employer on either the initial eligibility date or on the date the vote was conducted. She had performed work for the employer prior to those dates, but was not expected to do so thereafter. She was receiving payments and benefits from the employer on those dates but, as counsel for the employer conceded, this was entirely in the nature of compensation for work performed prior to those dates. These considerations all draw us to the conclusion that Ms. Robinson's relationship with the intervener was not such as to make her an eligible voter.

9. Counsel for the employer argued that Ms. Robinson should be treated as an employee for the purpose of the vote because dues were deducted from her paycheques and remitted to the union during the period after June 1, 1987, and because her rights under the collective agreement

could still have been the subject of a grievance by the union. Dealing with the latter point first, we observe that a person may have an interest in the enforcement of a collective agreement without being considered an employee for the purpose of a representation vote. For example, a former employee receiving pension benefits may be interested in the enforcement of the current collective agreement if it incorporates the pension plan by reference or otherwise addresses the employer's obligation to pensioners. No one would seriously suggest, however, that in those circumstances pensioners would form part of the voting constituency in a termination application.

10. There is a certain attractiveness to the argument that a person subject to union dues deductions should have a say in whether the union's bargaining rights are terminated. The application of that argument to Ms. Robinson's situation, however, suffers from the same fallacy as the argument that she must have been an "employee" for the purposes of the vote because she was still being paid at the relevant time. The collective agreement is not before us, nor do we have any explanation of the reason for deduction of union dues. All we have is the agreement of the parties that such deductions were made and remitted to the union, together with the acknowledgement of counsel for the employer that the payments from which such deductions were made were all in the nature of compensation for past services, not current services. In the absence of any other explanation, we can only suppose that dues were deducted because the collective agreement required such deductions from payments of this type. If that is so, the dues deductions are referable solely to past services in the same sense as were the payments from which they were deducted. The Board's test for voter eligibility focuses on the existence at the relevant time of a relationship involving the performance or anticipated performance of work for the employer by the employee. The fact that these dues deductions occurred after June 1, 1987 does not detract from the conclusion that the requisite relationship between Ms. Robinson and the intervener vote had come to an end by that date.

11. We determine that Ms. Robinson was not eligible to vote.

Joan Timothy

12. Joan Timothy, the applicant in these proceedings, was involved in a serious car accident on June 13, 1987. As a result, she was unable to attend at the poll and cast her ballot on June 16, 1987. As of the date of our hearing on these issues she was still receiving treatment and unable to return to work or attend the Board's hearing. She was then capable of marking a ballot, however. She does not ask that an entirely new vote be conducted. She asks that arrangements which will accommodate her current disability be made to give her another opportunity to cast a ballot before any ballots are counted.

13. There is no question about Ms. Timothy's eligibility to vote on June 16, 1987, as she was and is expected to return to work when she is able. The only question is whether the Board should afford her another opportunity to vote.

14. A good deal of the Board's jurisprudence on the opportunity to participate in a representation vote is aptly summarized in Sack and Mitchell, *Ontario Labour Relations Board Law and Practice* (1985, Butterworths, Toronto) at pages 245 and 246:

3:7340 Opportunity to vote. Employees eligible to vote must be given an opportunity to do so. It is for this reason that the Board attempts to schedule the vote during normal working hours on a date when the plant or operation concerned is expected to function at normal full time capacity. If adequate notice of the vote is not given, or if operations are shut down or curtailed, or if most of the employees have been transferred to another location on the day of the vote, or if there are no employees, or only one, at work on the date of the vote, the Board may schedule a vote for another date. However, the Board will not order another vote merely because a more repre-

sentative work force will be employed at some other time, or postpone a vote because the number of employees has been reduced, unless it is established that the reduction was effected by the employer in order to influence the vote. *Inevitably, some employees will be absent on the day of the vote because of illness, vacation or work schedule, but, while they are eligible to vote on the day of the vote, no further opportunity will be afforded to them to do so.* The Board has declined to order a new vote simply because there was a low turnout of voters or non-English voters did not vote because they did not understand or inquire into the import of the Forms, but it has ordered a new vote where no employees voted out of a reasonable fear that, if they did, they would be the only persons to cast a ballot.

[Emphasis added, footnotes omitted]

The decision cited by this text in support of the proposition in the emphasized portion of this passage is *Ontario Cancer Foundation, Hamilton Clinic*, [1983] OLRB Rep. Feb. 246.

15. We agree with counsel for the applicant and the intervener that the circumstances dealt with in *Ontario Cancer Foundation, Hamilton Clinic, supra*, are different from those in this case. There, an employee's inability to vote was complained of by the employer but not the employee affected, the cause of that inability was foreseeable by the employer when it agreed to the vote date and the problem was not raised until after the vote had been conducted and the ballots counted. Here, the cause of the inability was not foreseeable at the time vote arrangements were made, the problem was brought promptly to the Board's attention and the ballot box is sealed. Nevertheless, the emphasized portion of the above-quoted passage is an accurate statement of the Board's practice, and we have concluded that that practice should prevail here.

16. It is not hard to be sympathetic about Ms. Timothy's situation. There would not be the same sympathy, however, if she had missed the vote because she had slept in or got caught in traffic, or because her car had broken down or because she had something else she preferred to do. Would there be the same sympathy if Ms. Timothy had caused the accident in which she was injured? Would the Board await the outcome of criminal or civil proceedings in which that had been alleged? Would it undertake the trial of a motor vehicle negligence issue before determining the result of a certification or termination proceeding?

17. The twin goals of certainty and expedition in representation matters require that the times and places at which those eligible will have the opportunity to vote must be settled in advance and remain settled, so that all interested parties know in advance when their campaigns and the vote will be at an end and the Board is able to get on with determining the effect to be given to the results. The process would be substantially disrupted if the counting of ballots had to await inquiries into why eligible voters did not vote and whether some cause for their absence other than lack of notice or interference by one of the parties should entitle them to another opportunity to vote. In that regard, we have some doubt whether a further opportunity to vote should ever be given to some but not all eligible voters otherwise than on agreement of the parties.

18. Counsel argued that Ms. Timothy ought to be allowed to cast a late ballot because in a unit this small one ballot may be the deciding ballot. One ballot can be the deciding ballot in any representation vote. Neither the size of this unit nor the fact that she is the applicant in this application gives Ms. Timothy's inability to vote any special legal significance.

19. The intervener's initial written submissions contained arguments based on the *Ontario Human Rights Code* and section 15 of the *Canadian Charter of Rights and Freedoms*. Those arguments were not pursued by counsel for the intervener at hearing, so it is unnecessary to deal with them here.

20. We conclude it would not be appropriate either to afford Ms. Timothy a further opportunity to cast a ballot or to conduct a further vote.

21. We therefore direct that the ballots other than Ms. Robinson's be counted.

1473-87-R International Woodworkers of America, Applicant v. United Sawmill Limited, Respondent

Bargaining Unit - Certification - Pre-Hearing Vote - Parties not in agreement on the description of the appropriate bargaining unit before the vote was conducted - No one requesting a hearing after vote - Board disposing of application on the material before it without conducting a hearing - Board adopting description of voting constituency as the appropriate bargaining unit

BEFORE: *Owen V. Gray*, Vice-Chair, and Board Members *J. A. Rundle* and *J. Redshaw*.

DECISION OF THE BOARD; November 30, 1987

1. No statement of desire to make representations has been filed with the Board within the time fixed under subsection 2 of section 70 of the Board's Rules of Procedure following the taking of the pre-hearing representation vote pursuant to the Board's direction of October 21, 1987.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

3. The parties were not in agreement on the description of the appropriate bargaining unit before the vote was conducted. The applicant took the position that the appropriate bargaining unit in this application should be described as:

all employees of the respondent, United Sawmill Limited (Woods) Hearst, Ontario, save and except foremen, persons above the rank of foremen, office and sales staff, currently represented by Local 2995, Lumber and Sawmill Workers Union.

The respondent's position was that the unit should be described

as per collective agreement Art. III Paragraphs: 301(a), 301(b) [sic].

The collective agreement referred to is a collective agreement between the respondent and the Lumber and Sawmill Workers Union Local 2995, of the United Brotherhood of Carpenters and Joiners of America (hereafter referred to as "the incumbent") with effect from September 1, 1984 to August 31, 1987. The applicant and respondent did agree to the exclusion of "scalars." It was not clear from the material, however, whether "scalars" were included in the incumbent's unit.

4. As no interested party has requested a hearing, we have the option of disposing of this application on the material before us without conducting a hearing: ss. 70(5), Rules of Procedure. That is so even though the parties are not in agreement on the description of the appropriate bargaining unit. While we might nevertheless schedule a hearing if we felt that the material before us was an insufficient basis on which to base a decision, that is not the case here.

5. The unit represented by the incumbent is ordinarily treated as the appropriate unit in a displacement application such as this. That principle guided our determination and description of the voting constituency for the purpose of the pre-hearing representation vote. In the absence of representations explaining why we should do otherwise, we will adopt our description of the voting constituency as the description of the appropriate bargaining unit.

6. Accordingly, we find that

all employees of the respondent engaged in woods operations on the limits
and on the worksites of the respondent

constitute a unit of employees of the respondent appropriate for collective bargaining. For purposes of clarity, the word "employees" as used in this bargaining unit description includes all those employed in job classifications set out in the wage schedule attached to and forming part of the September 1, 1984 to August 31, 1987 collective agreement between the respondent and the Lumber and Sawmill Workers' Union Local 2995, of the United Brotherhood of Carpenters and Joiners of America, including those who are employed in job classifications, if any, which have been established and become part of the aforesaid wage schedule during the term of that agreement.

7. The Board is satisfied that not less than thirty-five per cent of the employees of the respondent in the bargaining unit were members of the applicant at the time the application was made.

8. On the taking of the pre-hearing representation vote directed by the Board, more than fifty per cent of the ballots cast were cast in favour of the applicant.

9. A certificate will issue to the applicant.

10. The Registrar will destroy the ballots cast in the pre-hearing representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30-day period.

1588-87-R International Woodworkers of America, Applicant v. **Wire Rope Industries Ltd.**, Respondent v. Lumber and Sawmill Workers' Union, Local 2693, of the United Brotherhood of Carpenters and Joiners of America, Intervener

Bargaining Unit - Certification - Collective Agreement - Timeliness - Whether collective agreement in existence so as to render certification application untimely - Incumbent union having given timely notice to bargain - Collective agreement expiring - Certification application timely - Only one employee in office unit - Board departing from practice of separating office and plant units

BEFORE: *Patricia Hughes*, Vice-Chair, and Board Members *R. M. Sloan* and *D. A. Patterson*.

DECISION OF THE BOARD; December 16, 1987

1. By decision dated October 7, 1987, the Board directed that a pre-hearing representation

vote be taken in this application for certification. The vote was held on October 20, 1987, and the ballot box sealed until certain outstanding matters have been resolved.

2. The Board finds that the applicant is a trade union within the meaning of clause 1(1)(p) of the *Labour Relations Act* ("the Act").

3. Wire Rope Industries Ltd. ("Wire Rope" or "the employer") had objected to the presence on the ballot of the intervener, Lumber and Sawmill Workers' Union, Local 2693, of the United Brotherhood of Carpenters and Joiners of America ("Local 2693") on the basis that because Local 2693 did not commence to bargain within sixty days following the giving of the notice to bargain on April 23, 1987, in accordance with the collective agreement and the Act, it no longer represented the employees in the bargaining unit and the Board should so declare in accordance with subsection 59(2) of the Act. The employer objected in the alternative that the application was untimely.

4. In its decision of October 7th, the Board ruled that there having been no application to terminate Local 2693's bargaining rights or a declaration to that effect at the time of the application, the name of Local 2693 would be properly on the ballot. It also stated that the issue of timeliness could be addressed by the parties after the vote had been taken. In addition, the Board raised an issue that had not been the subject of dispute between the parties. They had agreed on the description of the bargaining units which were the descriptions in the collective agreement between Wire Rope and Local 2693. One of those units was composed of only one employee, however. The Board cannot determine a bargaining unit of only one employee, pursuant to subsection 6(2) of the Act. The Board thus struck a single voting constituency that would encompass all the employees in both bargaining units, ordered the segregation of each ballot and sealing of the ballot box and invited the parties to make submissions on the appropriate bargaining unit(s).

5. By letter dated October 27, 1987, the employer filed written submissions on the issue of timeliness (these were in addition to submissions filed with its reply to the application) and on the appropriate bargaining unit(s). The applicant, International Woodworkers of America ("IWA"), and Local 2693 are represented by the same counsel who replied to the employer's submissions by letter dated November 20, 1987, pursuant to the date set by the Registrar when she forwarded the employer's letter of October 27, 1987 to the IWA and Local 2693. None of the parties seeks an oral hearing in this matter. Accordingly, this decision sets out our rulings and reasons therefor with respect to the two outstanding matters on the basis of the written submissions of the parties.

6. The collective agreement between Wire Rope and Local 2693 ("the agreement") has a term of operation from August 1, 1985 to July 31, 1987. Article 2:01 of the agreement reads as follows:

Article 2 - Period

2:01 The Company and the Union agree one with the other that they will abide by the Articles of this Agreement from August 1, 1985 to July 31, 1987 inclusive, and from year to year thereafter unless either party desires to change or terminate the Agreement, in which case the party desiring the change or termination shall notify the other party, in writing, at least sixty (60) days prior to July 31st. Either party opening the Agreement in the manner provided above shall notify the other party in writing as to the changes desired.

Thus the collective agreement continues in operation unless one of the parties takes action to terminate it. Notification of desire to change the agreement terminates the agreement as of the expiry date. Subsections 53(1) and (2) of the Act read as follows:

53.-(1) Either party to a collective agreement may, within the period of ninety days before the agreement ceases to operate, give notice in writing to the other party of its desire to bargain with a view to the renewal, with or without modifications, of the agreement then in operation or to the making of a new agreement.

(2) A notice given by a party to a collective agreement in accordance with provisions in the agreement relating to its termination or renewal shall be deemed to comply with subsection (1).

Accordingly, the notice to be given under the collective agreement complies with the notice provisions of the Act.

7. By letter dated April 23, 1987, W. McIntyre, Business Representative of Local 2693, wrote to Paul Groeneveld, Branch Manager of Wire Rope, requesting changes in the collective agreement "to become effective on the 1st day of August 1987". There is no dispute that this aspect of the notification procedure - notice of desire to make changes - is timely in accordance with the provisions of the agreement. The letter concludes that "the proposed changes will follow in a separate letter". In fact, the proposed changes were not made until September 16, 1987 when they were set out in a letter of that date from Mr. McIntyre to Kevin Smith, Branch Manager of Wire Rope. In a reply to Mr. McIntyre, dated September 25, 1987, Claude Poirier, Manager-Industrial Relations for Wire Rope, acknowledged receipt of Local 2693's proposed changes and stated

We would like to inform you that we will wait to know the decision of the Labor [sic] Board concerning the current issue i.e. Application for certification from the I.W.A.

The application by the IWA had been filed on September 4, 1987. If the collective agreement continued in operation after July 31, 1987, the application would therefore be untimely. The timeliness issue had been raised by reply filed by Wire and Rope dated September 18, 1987. No reference to the September 16th, letter sent by Local 2693 to the employer is made in the reply; however, the employer does state that the failure to bargain within the sixty days following the filing of the notice to bargain "should be deemed to have the effect of continuing the collective agreement in effect until July 31, 1988, in which case the application by the applicant is not timely as required by section 5(4) of the Act". In its submissions of October 27th, the employer modified this argument somewhat by submitting that first, the notification process was not complete and second, a failure to bargain (or to seek a continuation of the term of the agreement under subsection 52(2) of the Act) by Local 2693 means "it slept on its rights and consequently the Board should find that it waived the amendment or termination process and in so doing activated the year to year continuation mechanism provided by the collective agreement".

8. Local 2693 and the IWA argues first that the notice to bargain of April 23, without notice of the changes, triggered the termination of the agreement as of July 31, 1987. The suggestion, then, is that notice of the changes is not a required part of the process. If it is a required part of the process, Local 2693 and the IWA argue that a delay in providing notice of the changes is sufficient to cure any problem resulting from failure to give notice of the changes within the sixty days prior to July 31, 1987, but that if it is not, the only recourse is an application to terminate Local 2693's bargaining rights. (Local 2693 and the IWA explain the delay as resulting from vacations and unavailability of employees.)

9. In our view, the April 23rd notice by Local 2693 is the notice to bargain contemplated by Article 2:01 of the collective agreement and, by virtue of subsection 53(2), that contemplated by subsection 53(1). Thus the collective agreement expired on July 31, 1987 and the application by the IWA is timely. A party seeking the content of the changes desired by the other party where the

other party has failed to provide them, has recourse through sections 15 and 59 of the Act or through the grievance process set out in the agreement.

10. The second issue which must be considered is the description of the bargaining unit. The employer contends that the two units proposed by the parties have existed "for the duration of the relationship between the Respondent and the Intervener" and reflect the Board's practice of separating office and plant units. It states further that there has been a history of two persons in the office unit, but concedes that there are no immediate plans to hire a second individual. The employer thus supports two units or, in the alternative, determination of only one plant unit. The union maintains that while two units are described in the collective agreement, they effectively comprise one unit which could be described either in "two segments" reflecting the current description or in the manner in which the Board described the voting constituency. Local 2693 and the IWA do not dispute that there were previously two persons in the office unit.

11. While it is correct that it is the Board's normal practice to separate office and plant employees in different bargaining units, that practice is departed from where an employee may be deprived of collective bargaining if the practice is followed: *The Corporation of the Town of Oakville*, [1973] OLRB Rep. May 260, at para. 6. In this case, the small number of employees (three in total) the fact that only one person who would be in an office unit is employed, and the fact that at most two "office" people have been employed in the past and that there is no expectation of others being hired in the immediate future are factors the Board should take into account in determining the appropriate bargaining unit. The Board finds that

all employees of the respondent at Thunder Bay, save and except non-working forepersons, persons above the rank of non-working forepersons, and outside salespersons

constitute a unit of employees of the respondent appropriate for collective bargaining.

12. The matters in dispute having been determined, the Board appoints a Labour Relations Officer to open the ballot box and count the segregated ballots in this application.

13. This matter is referred to the Registrar.

CASE LISTINGS NOVEMBER 1987

1.	Applications for Certification	283
2.	Applications for First Contract Arbitration	296
3.	Applications for Declaration of Related Employer	296
4.	Sale of a Business	296
5.	Union Successor Rights	297
6.	Applications for Declaration Terminating Bargaining Rights.....	297
7.	Ministerial Reference (Conciliation Officer)	297
8.	Ministerial Reference (Board of Arbitration).....	297
9.	Applications for Declaration of Unlawful Strike	297
10.	Complaints of Unfair Labour Practice	298
11.	Applications for Consent to Early Termination of Collective Agreement	301
12.	Jurisdictional Disputes	301
13.	Applications for Declaration of Employee Status.....	301
14.	Complaints Under the Occupational Health & Safety Act	301
15.	Construction Industry Grievances	301
16.	Applications for Reconsideration of Board's Decision	304
17.	Right of Access	304

APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING NOVEMBER 1987

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

3428-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. Rocha Carpenters (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit) (*Having regard to the agreement of the parties*)

3548-86-R: United Food & Commercial Workers Union, Local 175 (Applicant) v. Rill Food Services Ltd. (Respondent)

Unit #1: "all employees of the respondent in the City of Gloucester, save and except managers, persons above the rank of manager, office staff, persons employed for not more than 24 hours per week and students employed during the school vacation period" (72 employees in unit)

Unit #2: "all employees of the respondent in the City of Gloucester regularly employed for not more than 24 hours per week and students employed during the school vacation period" (17 employees in unit)

0637-87-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Rendez-vous Restaurants of Fort Frances Limited (Respondent) v. Group of Employees (Objectors)

Unit #1: "all employees of the respondent at Fort Frances, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (44 employees in unit)

Unit #2: (see *Bargaining Agents Certified Subsequent to a Post-Hearing Vote*)

0778-87-R: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Houle et Frère Inc., and Parrattonnerre Montréal Inc. (Respondents)

Unit: "all carpenters and carpenters' apprentices employed by the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell" (6 employees in unit)

0872-87-R: United Brotherhood of Carpenters & Joiners of America, General Workers' Union, Local 1030 (Applicant) v. Zenith Wood Turners Inc., and 148620 Canada Inc. (Respondents)

Unit: "all employees of the respondents in the County of Glengarry, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, and students employed during the school vacation period" (15 employees in unit) (*Having regard to the agreement of the parties*)

1156-87-R: Labourers' International Union of North America, Local 183 (Applicant) v. Targa Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquering and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

1243-87-R: United Food & Commercial Workers International Union, Local 633 (Applicant) v. H.W. Gluck Limited, c.o.b. as Keswick I.G.A. (Respondent) v. Group of Employees (Objectors)

Unit: "all meat department employees of the respondent in Keswick, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (43 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1348-87-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 508 (Applicant) v. P. B. Rombough Limited (Respondent)

Unit: "all plumbers and plumbers' apprentices in the employ of the respondent in all sectors of the construction industry other than the industrial, commercial and institutional sector, in that portion of the District of Algoma south of the 40th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1398-87-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. G.E. Crandell Construction Limited (Respondent)

Unit: "all construction labourers in the employ of the respondent in the Province of Ontario and that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (14 employees in unit)

1411-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. 512729 Ontario Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquering and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

1561-87-R: Canadian Union of Public Employees (Applicant) v. The Kristus Darzs Home for the Aged Inc. (Respondent)

Unit #1: "all employees of the respondent in Woodbridge, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (17 employees in unit)

Unit #2: (see *Bargaining Agents Certified Subsequent to a Post-Hearing Vote*)

1733-87-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Colonial Furniture Co. (Ottawa) Ltd. (Respondent)

Unit #1: "all employees of the respondent at Gloucester, save and except supervisors, persons above the rank

of supervisor, office, clerical and sales staff, retail stores' staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (51 employees in unit)

Unit #2: (see *Applications for Certification Dismissed Without Vote*)

1768-87-R: United Steelworkers of America (Applicant) v. Guillevin International Inc. (Respondent) v. Group of Objectors (Objectors)

Unit #1: "all employees of the respondent in Thunder Bay, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, and students employed during a school vacation period" (6 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Unit #2: "all office and clerical staff of the respondent in Thunder Bay save and except supervisors, persons above the rank of supervisor, outside sales staff and students employed during the school vacation period" (14 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1777-87-R: International Brotherhood of Painters & Allied Trades, Local 1891 (Applicant) v. Skeates Plastering (Burlington) Ltd. (Respondent)

Unit: "all employees of the respondent in the Town of Burlington, save and except foremen, persons above the rank of foreman, office and sales staff and clerical employees" (6 employees in unit) (*Having regard to the agreement of the parties*)

1781-87-R: Canadian Brotherhood of Railway Transport & General Workers (Applicant) v. Laidlaw Waste Systems Ltd. (Respondent)

Unit: "all employees of the respondent at its Total Recycling Division in the City of Kitchener, save and except foreman, persons above the rank of foreman, office staff and persons regularly employed for not more than 24 hours per week" (7 employees in unit) (*Having regard to the agreement of the parties*)

1783-87-R: United Steelworkers of America (Applicant) v. 312127 Ontario Limited (Respondent)

Unit: "all employees of the respondent's Exterior Systems Division in the Town of Vaughan, save and except foremen, persons above the rank of foreman, office and sales staff" (4 employees in unit)

1788-87-R: Teamsters Union Local 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Canada Building Materials Company (Respondent)

Unit: "all employees of the respondent in Milton, save and except foremen, persons above the rank of foreman, batcher dispatcher, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (7 employees in unit) (*Having regard to the agreement of the parties*)

1800-87-R: Canadian Union of Public Employees (Applicant) v. Arbor Living Centres Inc. (Respondent)

Unit: "all employees of the respondent at its Chateau Park Lodge Retirement Home in Windsor, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except professional medical staff, registered, graduate and undergraduate nurses, pharmacists, dietitians, office, clerical and technical staff, supervisors and persons above the rank of supervisor" (9 employees in unit) (*Having regard to the agreement of the parties*)

1847-87-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW (Applicant) v. Creative Machining Systems Inc. (Respondent)

Unit: "all employees of the respondent in the Town of Wallaceburg, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (16 employees in unit) (*Having regard to the agreement of the parties*)

1852-87-R: International Union of Operating Engineers, Local 793 (Applicant) v. Itarcan Construction Inc. (Respondent)

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all other sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

1853-87-R: United Steelworkers of America (Applicant) v. Oxy-Weld Limited (Respondent)

Unit: "all employees of the respondent at Barrie and Owen Sound, save and except foremen, persons above the rank of foreman, office and sales staff" (7 employees in unit) (*Having regard to the agreement of the parties*)

1854-87-R: United Steelworkers of America (Applicant) v. McKerlie-Millen Inc. (Respondent)

Unit: "all employees of the respondent at its A.W.L. Steego Division in the Municipality of Metropolitan Toronto, employed for not more than 24 hours per week, and students employed during the school vacation period, save and except foremen, persons above the rank of foreman, office and sales staff" (13 employees in unit) (*Having regard to the agreement of the parties*)

1859-87-R: National Automobile, Aerospace & Agricultural Implement Workers' Union of Canada (CAW-Canada) (Applicant) v. Relmech Manufacturing Limited (Respondent)

Unit: "all employees of the respondent in the Township of Woolwich, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, technical staff, engineering staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (60 employees in unit) (*Having regard to the agreement of the parties*)

1873-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. North York Plastering & Drywall (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

1889-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Vista Construction of Canada Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

1894-87-R: Operative Plasterers & Cement Masons International Association of the United States & Canada, Local 598 (Applicant) v. Noranda Forest Sales Inc. (Respondent)

Unit: "all employees of the respondent in the City of Brampton, save and except office, clerical and sales staff, foremen and those above the rank of foreman" (12 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1904-87-R: United Steelworkers of America (Applicant) v. Porcupine Powder Company Inc. (Respondent)

Unit: "all employees of the respondent in the City of Timmins, save and except supervisors, persons above the rank of supervisor, office, sales and technical staff, employees regularly employed for not more than 24 hours per week and students employed during the school vacation period" (5 employees in unit) (*Having regard to the agreement of the parties*)

1905-87-R: United Food & Commercial Workers' International Union, Local 175, AFL:CIO:CLC (Applicant) v. Excel Coach Lines Limited (Respondent)

Unit: "all employees of the respondent in the Town of Kenora regularly employed for not more than 24 hours per week, save and except supervisor, persons above the rank of supervisor, and office staff" (34 employees in unit) (*Having regard to the agreement of the parties*)

1906-87-R: London & District Service Workers' Union, Local 220, S.E.I.U., AFL:CIO:CLC (Applicant) v. The Elgin County Roman Catholic Separate School Board (Respondent) v. Group of Employees (Objectors)

Unit #1: "all office and clerical employees of the respondent in Elgin County, save and except supervisors, persons above the rank of supervisor, secretary to the Director of Education, secretary to the Superintendent of Business and Finance, payroll officer, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (5 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all office and clerical employees of the respondent in Elgin County regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, secretary to the Director of Education, secretary to the Superintendent of Business and Finance, and payroll officer" (3 employees in unit) (*Having regard to the agreement of the parties*)

1916-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Rocam Store Fixtures Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

1920-87-R: Christian Labour Association of Canada (Applicant) v. Chateau Gardens Corporation (Respondent)

Unit #1: "all registered and graduate nurses employed in a nursing capacity by the respondent at its Chateau Gardens Queens Nursing Home in London, save and except assistant director of resident care, persons above the rank of assistant director of resident care, and persons regularly employed for not more than 24 hours per week" (2 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all registered and graduate nurses regularly employed for not more than 24 hours per week in a nursing capacity by the respondent at its Chateau Gardens Queens Nursing Home in London, save and except assistant director of resident care and persons above the rank of assistant director of resident care" (2 employees in unit) (*Having regard to the agreement of the parties*)

1921-87-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Tricard Mechanical (Respondent)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of

the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit) (*Having regard to the agreement of the parties*)

1927-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Rocam Store Fixtures Ltd. (Respondent)

Unit: "all employees of the respondent at Mississauga, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (2 employees in unit) (*Having regard to the agreement of the parties*)

1953-87-R: International Union of Operating Engineers, Local 793 (Applicant) v. Esam Construction Limited (Respondent) v. Labourers' International Union of North America, Local 1059 (Intervener)

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees of the respondent in the Province of Ontario in all other sectors in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

1963-87-R: Ontario Public Service Employees Union (Applicant) v. The Salvation Army Wycliffe Booth House/Rebekah House (Respondent)

Unit #1: "all employees of the respondent in the County of Middlesex, save and except House Managers and Manager of Support Services, those above the rank of House Manager and Manager of Support Services, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (26 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: "all employees of the respondent in the County of Middlesex regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except House Managers and Manager of Support Services, those above the rank of House Manager and Manager of Support Services, and office staff" (5 employees in unit) (*Having regard to the agreement of the parties*)

1974-87-R: London & District Service Workers' Union, Local 220, S.E.I.U., AFL:CIO:CLC (Applicant) v. 521890 Ontario Inc., c.o.b. as The Villa Home of Retirement (Respondent) v. Group of Employees (Objectors)

Unit #1: "all employees of the respondent in Lucan, save and except supervisors, persons above the rank of supervisor, graduate nurses, registered nurses, office and clerical staff, employees regularly employed for not more than 24 hours per week and students employed during the school vacation period" (5 employees in unit) (*Having regard to agreement of the parties*)

Unit #2: "all employees of the respondent in Lucan, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, graduate nurses, registered nurses, office and clerical staff" (5 employees in unit) (*Having regard to the agreement of the parties*)

1995-87-R: Service Employees International Union, Local 204 (Applicant) v. VS Services Limited (Respondent)

Unit: "all employees of the respondent at Toronto Aged Men's and Women's Home (Belmont House) in the City of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (15 employees in unit) (*Having regard to the agreement of the parties*)

2015-87-R: United Steelworkers of America (Applicant) v. Sterling Inc. (Respondent)

Unit: "all employees of the respondent in St. Catharines, save and except foremen, persons above the rank of foreman, research and development staff, office and sales staff" (46 employees in unit) (*Having regard to the agreement of the parties*)

2024-87-R: International Brotherhood of Painters & Allied Trades (Applicant) v. Dant Industries Limited (Respondent)

Unit: "all employees of the respondent in the City of Mississauga, save and except foremen, persons above the rank of foreman, office clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (51 employees in unit) (*Having regard to the agreement of the parties*)

2026-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Master's Construction Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

2035-87-R: International Union of Operating Engineers, Local 793 (Applicant) v. B & R Foundations Ltd. (Respondent)

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except foremen and persons above the rank of non-working foreman" (3 employees in unit)

2038-87-R: International Union of Operating Engineers, Local 793 (Applicant) v. Gaston H. Poulin Contractor Limited (Respondent)

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees of the respondent in all other sectors in that portion of the District of Algoma south of the 49th parallel of latitude, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2046-87-R: Ontario Nurses' Association (Applicant) v. Victorian Order of Nurses, Sault Ste. Marie Branch (Respondent)

Unit: "all registered and graduate nurses engaged in a nursing capacity by the respondent in the District of Algoma, save and except supervisor and persons above the rank of supervisor" (43 employees in unit) (*Having regard to the agreement of the parties*)

2049-87-R: Labourers' International Union of North America, Local 183 (Applicant) v. Siddall Inc., and/or Kenneth Siddall Inc. (Respondents)

Unit: "all construction labourers in the employ of the respondents in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the

employ of the respondents in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (14 employees in unit)

2056-87-R: Canadian Union of Public Employees (Applicant) v. Guelph General Hospital (Respondent)

Unit: "all employees of the respondent in Guelph, save and except professional medical staff, graduate nursing staff, under-graduate nurses, graduate pharmacists, under-graduate pharmacists, graduate dietitians, student dietitians, technical personnel, supervisors, persons above the rank of supervisor, office staff and employees in bargaining units for which any trade union held bargaining rights as of October 23, 1987" (5 employees in unit) (*Having regard to the agreement of the parties*)

2069-87-R: International Union of Operating Engineers, Local 793 (Applicant) v. 643869 Ontario Limited, c.o.b. as Spring Holdings (Respondent)

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all other sectors in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2094-87-R: International Union of Operating Engineers, Local 793 (Applicant) v. 740170 Ontario Inc., D-B-A Bell Contracting & Equipment (Respondent)

Unit: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees of the respondent in all other sectors in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

1428-87-R: International Woodworkers of America (Applicant) v. Levesque Plywood Limited (Respondent) v. Lumber & Sawmill Workers' Union, Local 2995 of the United Brotherhood of Carpenters & Joiners of America (Intervener)

Unit: "all employees of the respondent in its Logging Division, at and out of Hearst, save and except foremen, persons above the rank of foreman, scalers, office and sales staff and employees in bargaining units for which any trade union held bargaining rights as of August 26, 1987" (20 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer		20
Number of persons who cast ballots	9	
Number of ballots in favour of applicant		8
Number of ballots marked in favour of intervener		1

1429-87-R: International Woodworkers of America (Applicant) v. Levesque Lumber (Hearst) Limited (Respondent) v. Lumber & Sawmill Workers' Union, Local 2995 (Intervener)

Unit: "all employees of the respondent in Hearst, save and except foremen, persons above the rank of foreman, scalers, office and sales staff, and employees in bargaining units for which any trade union held bargaining rights as of August 26, 1987" (140 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list		140
Number of persons who cast ballots	46	

Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	44	
Number of segregated ballots cast by persons whose names do not appear on voters' list	2	
Number of ballots marked in favour of applicant		40
Number of ballots marked in favour of intervener		4

1560-87-R: International Woodworkers of America (Applicant) v. Spruce Falls Power & Paper Company Ltd. (Respondent) v. Lumber & Sawmill Workers' Union, Local 2995 of United Brotherhood of Carpenters & Joiners of America (Intervener)

Unit: "all employees of the respondent in Kapuskasing who are engaged in the woods operations on the limits and on the work site of the respondent, save and except foremen, persons above the rank of foreman, office and sales staff" (431 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of revised voters' list		431
Number of persons who cast ballots	151	
Number of ballots marked in favour of applicant		133
Number of ballots marked in favour of intervener		18

1600-87-R: International Woodworkers of America (Applicant) v. MacMillan Bloedel Limited (Respondent) v. Lumber & Sawmill Workers' Union, Local 2693 of United Brotherhood of Carpenters & Joiners of America (Intervener)

Unit: "all employees of the respondent at its Nipigon Woods Division engaged in woods operations on the limits and on the wood sites of the company" (4 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer		4
Number of persons who cast ballots	4	
Number of ballots marked in favour of applicant		4
Number of ballots marked in favour of intervener		0

1713-87-R: International Woodworkers of America (Applicant) v. 3R Timber Inc. (Respondent) v. Lumber & Sawmill Workers' Union, Local 2995, of United Brotherhood of Carpenters & Joiners of America (Intervener)

Unit: "all employees of the respondent at Opasatika, Ontario, who are engaged in woods operations on the limits, at the garage in the mill yard and on the work sites of the respondent" (19 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer		19
Number of persons who cast ballots	11	
Number of ballots marked in favour of applicant		11
Number of ballots marked against applicant		0

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

0700-87-R: Ontario Secondary School Teachers' Federation (Applicant) v. The Sault Ste. Marie Board of Education (Respondent)

Unit: "all occasional teachers employed by the respondent in its secondary panel in Sault Ste. Marie, save and except persons who, when they are employed as substitutes for other teachers, are teachers as defined in the *School Boards and Teachers Collective Negotiations Act*" (55 employees in unit) (*Clarity Note*)

Number of names of persons on list as originally prepared by employer		55
Number of persons who cast ballots	20	
Number of ballots marked in favour of applicant		17
Number of ballots marked against applicant		3

0731-87-R: Ontario Secondary School Teachers' Federation (Applicant) v. North York Board of Education (Respondent)

Unit: "all occasional teachers employed by the respondent in its secondary panel in the City of North York, save and except persons who, when they are employed as substitutes for other teachers, are teachers as defined in the *School Boards and Teachers Collective Negotiations Act*" (277 employees in unit) (*Clarity Note*)

Number of persons on voters' list at start of vote		277
Number of persons who cast ballots	43	
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	41	
Number of segregated ballots cast by persons whose names appear on voters list	2	
Number of ballots marked in favour of applicant		33
Number of ballots marked against applicant		8

0883-87-R: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 527 (Applicant) v. D.W. Witmer Plumbing & Heating Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in all other sectors in the Regional Municipality of Waterloo except that portion of the geographic Township of Beverly annexed by North Dumfries Township, save and except non-working foremen and persons above the rank of non-working foreman" (11 employees in unit) (*Clarity Note*)

Number of persons on list as originally prepared by employer		11
Number of persons who cast ballots	11	
Number of ballots marked in favour of applicant		8
Number of ballots marked against applicant		3

1023-87-R: Ontario Liquor Board Employees' Union (Applicant) v. Fort Erie Duty Free Shoppe Ltd. (Respondent)

Unit: "all employees of the respondent in the Town of Fort Erie, save and except supervisors, persons above the rank of supervisors, secretary to the Store Manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (24 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer		24
Number of persons who cast ballots	24	
Number of ballots marked in favour of applicant		13
Number of ballots marked against applicant		11

1561-87-R: Canadian Union of Public Employees (Applicant) v. The Kristus Darzs Home for the Aged Inc. (Respondent)

Unit #1: (see *Bargaining Agents Certified Without Vote*)

Unit #2: "all employees of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered and graduate nurses and office and clerical staff" (7 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list		7
Number of persons who cast ballots	6	
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	5	

Number of segregated ballots cast by persons whose names do not appear on voters' list	1	
Number of ballots marked in favour of applicant		3
Number of ballots marked against applicant		2
Ballots segregated and not counted		1

Applications for Certification Dismissed Without Vote

3075-86-R: International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators of United States & Canada, AFL:CIO:CLC, Local 582 (Applicant) v. The Corporation of the City of Brantford (Respondent) v. Canadian Union of Public Employees (Intervener) (29 employees in unit)

0026-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Gracon Renovation & General Contracting (Respondent) (4 employees in unit)

0912-87-R: International Union of Operating Engineers, Local 796 (Applicant) v. The Royal Ontario Museum (Respondent) v. Service Employees International Union, Local 204 (Intervener #1) v. Ontario Public Service Employees Union, Local 543 (Intervener #2) (30 employees in unit)

1427-87-R: United Brotherhood of Carpenters & Joiners of America, Local 446 (Applicant) v. G.E. Crandell Construction Limited (Respondent) (5 employees in unit)

1448-87-R: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Hollingworth Drain Services (Respondent) (3 employees in unit)

1733-87-R: Retail, Wholesale & Department Store Union, AFL:CIO:CLC (Applicant) v. Colonial Furniture Co. (Ottawa) Ltd. (Respondent)

Unit #1: (see *Bargaining Agents Certified Without Vote*)

Unit #2: "all employees of the respondent at Gloucester regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, and retail stores' staff" (8 employees in unit) (*Having regard to the agreement of the parties*)

1734-87-R: Teamsters Local Union 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Canada Building Materials Company (Respondent) v. Group of Employees (Objectors)

Unit #1: "all employees of the respondent in the Township of Minto save and except batcher dispatcher, persons above the rank of batcher dispatcher, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (16 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: (see *Applications for Certification Dismissed Subsequent to a Post-Hearing Vote*)

1831-87-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Cloydon Construction Ltd. (Respondent) (70 employees in unit)

1846-87-R: Canadian Union of Public Employees (Applicant) v. Family Day Care Services (Respondent) (5 employees in unit)

1849-87-R: Brunner In-House Association (Applicant) v. Brunner Manufacturing & Sales Ltd. (Respondent)

Unit: "all employees of the respondent in Niagara Falls, Ontario, save and except foremen, persons above the rank of foreman, and office and sales staff" (41 employees in unit)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

1344-87-R: Fraternité Inter-Provinciale des Ouvriers en Electricité/Inter-Provincial Brotherhood of Electrical Workers (Applicant) v. Tannis Trading Inc. (Respondent) v. Teamsters, Chauffeurs, Warehousemen & Helpers, Local 91, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Intervener)

Unit: "all employees of the respondent in the City of Ottawa, save and except foremen, persons above the rank of foreman, sales, office and clerical staff, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week" (48 employees in unit)

Number of names of persons on list as originally prepared by employer		48
Number of persons who cast ballots	41	
Number of ballots marked in favour of applicant		15
Number of ballots marked against applicant		26

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

1947-86-R: Labourers' International Union of North America, Local 506 (Applicant) v. Torcom Construction Inc. (Respondent)

Unit: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

Number of names of persons on revised voters' list		9
Number of persons who cast ballots	8	
Number of ballots marked in favour of applicant		2
Number of ballots marked against applicant		6

0499-87-R: Canadian Union of Restaurant, Hotel & Related and Employees, Local 88 (Applicant) v. Cara Operations Ltd. (Respondent)

Unit #1: "all waitresses, waiters, buspersons, kitchen staff, cashiers and bartenders employed by the respondent at its Swiss Chalet Restaurant located at 1661 Denison Street, Unit T-12, Markham, Ontario, save and except assistant hostesses, persons above the rank of assistant hostess, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (16 employees in unit)

Number of names of persons on list as originally prepared by employer		16
Number of persons who cast ballots	11	
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	9	
Number of segregated ballots cast by persons whose names do not appear on voters' list	2	
Number of ballots marked in favour of applicant		1
Number of ballots marked against applicant		8
Ballots segregated and not counted		2

Unit #2: "all waitresses, waiters, buspersons, kitchen staff, cashiers, bartenders and students employed during the school vacation period at its Swiss Chalet Restaurant located at 1661 Denison Street, Unit T-12, Markham, Ontario, save and except assistant hostesses, persons above the rank of assistant hostess and persons regularly employed for not more than 24 hours per week" (15 employees in unit)

Number of names of persons on list as originally prepared by employer		15
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Number of persons who cast ballots	2	
Number of ballots marked in favour of applicant		0
Number of ballots marked against applicant		2

0546-86-R: Labourers' International Union of North America, Local 183 (Applicant) v. Starwall Concrete Forming Ltd. (Respondent)

Unit: "all employees of the respondent working at or out of the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office, sales and clerical staff, and those employees in the bargaining unit described in the subsisting collective agreement between the Residential Low-Rise Forming Contractors Association of Metropolitan Toronto and Vicinity and the Labourers' International Union of North America, Local 183, that was in effect on May 23, 1986" (4 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on list as originally prepared by employer		4
Number of persons who cast ballots	4	
Number of ballots marked in favour of applicant		2
Number of ballots marked against applicant		2

0637-87-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Rendez-vous Restaurants of Fort Frances Limited (Respondent) v. Group of Employees (Objectors)

Unit #1: (see *Bargaining Agents Certified without Vote*)

Unit #2: "all employees of the respondent at Fort Frances regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except supervisors and persons above the rank of supervisor" (20 employees in unit)

Number of persons on revised voters' list		20
Number of persons who cast ballots	18	
Number of ballots marked in favour of applicant		2
Number of ballots marked against applicant		16

1104-87-R: United Brotherhood of Carpenters & Joiners of America (Applicant) v. Gen Drug Company Ltd. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the respondent at its plant at Mississauga, Ontario, save and except foremen, persons above the rank of foreman, laboratory and technical personnel, office and sales staff" (7 employees in unit)

Number of names of persons on list as originally prepared by employer		7
Number of persons who cast ballots	5	
Number of ballots marked in favour of applicant		2
Number of ballots marked against applicant		3

1734-87-R: Teamsters Local Union 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Canada Building Material Company (Respondent) v. Group of Employees (Objectors)

Unit #1: (see *Bargaining Agents Certified Without Vote*)

Unit #2: "all employees of the respondent in the Township of Minto save and except batcher dispatcher, persons above the rank of batcher dispatcher, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (5 employees in unit)

Number of names of persons on list as originally prepared by employer		5
Number of persons who cast ballots	5	
Number of ballots marked in favour of applicant		0
Number of ballots marked against applicant		5

Applications for Certification Withdrawn

1102-87-R: United Brotherhood of Carpenters & Joiners of America (Applicant) v. Altracon Construction Ltd. (Respondent) v. Group of Employees (Objectors)

1326-87-R: United Steelworkers of America (Applicant) v. Honey Bee Sanitation Inc. (Respondent)

1799-87-R: Canadian Union of Public Employees (Applicant) v. University of Windsor (Respondent)

1967-87-R: Canadian Brotherhood of Railway Transport & General Workers (Applicant) v. Magalloy Castings Ltd. (Respondent)

2001-87-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Acme Building & Construction Limited (Respondent)

2032-87-R: Service Employees Union, Local 478 (Applicant) v. Belvedere Heights Home for the Aged (Respondent)

2037-87-R: Canadian Brotherhood of Railway, Transport & General Workers (Applicant) v. Travelways Limited (Respondent)

APPLICATIONS FOR FIRST CONTRACT ARBITRATION

1855-87-FC: Canadian Paperworkers Union (Applicant) v. W. H. Smith Ltd. (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1003-87-R: Lake Ontario District Council, United Brotherhood of Carpenters & Joiners of America (Applicant) v. 440770 Ontario Limited c.o.b. as Roscor Construction, and 508656 Ontario Limited c.o.b. as Roscor General Contractors (Respondents) (*Granted*)

1703-87-R: Aluminum Brick & Glass Workers International Union, Local 246-G (Applicant) v. Libbey St. Clair Inc., and Maple City Fulfillment (Respondents) (*Withdrawn*)

1844-87-R: International Union of Operating Engineers, Local 793 (Applicant) v. Comstock International Ltd., and Lundrigans Construction Ltd. (Respondents) (*Withdrawn*)

2096-87-R: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Siege Ducharme Ltée., & Produits Ducharme Ltée. (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

0945-87-R: Retail, Wholesale & Department Store Union, Local 448, AFL:CIO:CLC (Applicant) v. 696254 Ontario Limited c.o.b. as "Notes" (Respondent) (*Granted*)

1843-87-R: International Union of Operating Engineers, Local 793 (Applicant) v. Comstock International Ltd. and Lundrigans Construction Limited (Respondents) (*Withdrawn*)

1851-87-R: Labourers' International Union of North America, Ontario Provincial District Council & Labourers' International Union of North America, Local 607 (Applicants) v. Comstock International Ltd., and Lundrigans Construction Limited (Respondents) (*Withdrawn*)

2097-87-R: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Siege Ducharme Ltée., and Produits Ducharme Ltée., (Respondents) (*Withdrawn*)

UNION SUCCESSOR RIGHTS

1174-87-R: United Steelworkers of America (Applicant) v. Vulcan-Hart Canada, division of Premark F.E.G. Canada Inc. (Respondent) (*Granted*)

1354-87-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. M.L.S. Cable Installations Inc. (Respondent) v. Group of Employees (Objectors) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0199-87-R: Diane Bako (Applicant) v. Service Employees Union, Local 210 (Respondent) v. Essex County Automobile Club (Intervener) (*Dismissed*)

1183-87-R: Lise Bergeron (Applicant) v. Syndicat Canadien de la Fonction Publique (Respondent)

Unit: "all employees of 463725 Ontario Limited c.o.b. as Residence St. Francois in the Village of Casselman, save and except supervisors, and persons above the rank of supervisor" (*Granted*)

Number of names of persons on list as originally prepared by employer	32
Number of persons who cast ballots	24
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	24
Number of ballots marked in favour of respondent	6
Number of ballots marked against respondent	18

1437-87-R: Willie Driscoll (Applicant) v. National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), Local 252 (Respondent) (*Withdrawn*)

1944-87-R: Henry Roy, Martin Lilienskold (Applicants) v. International Union of Operating Engineers, Local 793 (Respondent) (*Withdrawn*)

MINISTERIAL REFERENCE (CONCILIATION OFFICER)

1941-87-M: Countryside Farms Limited (Employer) v. International Union of Operating Engineers, Local 793 (Trade Union)

MINISTERIAL REFERENCE (BOARD OF ARBITRATION)

0266-87-M: Beacon Transit Lines Incorporated (Employer) v. Teamsters Union, Local 938 (Trade Union)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

0864-87-U: The Ontario Produce Company, and The Oshawa Foods Division of the Oshawa Food Group (Applicants) v. Individual Employees Listed on Schedules A, B, C, D, E, F, & G to the Application, and Teamsters Local 419 (Respondents) (*Granted*)

1177-87-U: Rowntree MacIntosh Canada Limited (Applicant) v. National Automobile Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), Ron Pellerin, Barry Lines, McColley Jerome, Rafael Velaro and Martin Levert (Respondents) (*Withdrawn*)

1891-87-U: The Ontario Produce Company, and The Oshawa Foods Division of the Oshawa Food Group (Applicants) v. Individual Employees Listed on Schedule A to the Application, and Teamsters Local 419 (Respondents) (*Granted*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2307-85-U: United Brotherhood of Carpenters & Joiners of America, Local 93 (Complainant) v. Andre Roy, and Labourers' International Union of North America, Local 527 (Respondents) (*Withdrawn*)

2801-85-U: Labourers' International Union of North America, Local 1059 (Complainant) v. Brantco Construction (Respondent) (*Withdrawn*)

2831-86-U: John Borshell (Complainant) v. London & District Service Workers' Union, Local 220, S.E.I.U., AFL:CIO:CLC (Respondent) v. The Sisters of St. Joseph of the Diocese of London, in Ontario (Intervener) (*Withdrawn*)

3463-86-U: Ramesh Syal (Complainant) v. Canadian Automobile Workers Local 222 (Respondent) v. General Motors of Canada Limited (Intervener) (*Dismissed*)

0114-87-U: Mario Ferias (Complainant) v. United Steelworkers of America, Local 4215, Bill Mills and John Fitzpatrick (Respondent) (*Withdrawn*)

0263-87-U: Teresa Arabczuk (Complainant) v. International Association of Machinists & Aerospace Workers, Lodge 1295 (Respondent) v. Gabriel of Canada Limited (Intervener) (*Withdrawn*)

0334-87-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (C.A.W.-Canada) (Complainant) v. Rayco Stamping Products Ltd. (Respondent) v. Christian Labour Association of Canada (Intervener) (*Withdrawn*)

0353-87-U: Richard Grant (Complainant) v. Christian Labour Association of Canada (CLAC) (Respondent) (*Withdrawn*)

0399-87-U: Kenry Powell (Complainant) v. Vic Skurjat (Respondent) v. Masland Carpets of Canada Ltd. (Intervener) (*Dismissed*)

0501-87-U: Southern Ontario Newspaper Guild, Local 87 The Newspaper Guild (AFL-CIO-CLC) (Applicant) v. The Globe & Mail, division of Canadian Newspapers Company Limited (Respondent) (*Granted*)

0759-87-U: Duncan A. Carmichael (Complainant) v. Employees' Association, Computing Devices Company (Respondent) (*Dismissed*)

0771-87-U: Labourers' International Union of North America, Local 183 (Complainant) v. Be Good Holdings Ltd., and Mike Dellibenedetti (Respondents) (*Withdrawn*)

0910-87-U: United Brotherhood of Carpenters & Joiners of America, Local 1316 (Complainant) v. Wharton Industrial Developments Limited (Respondent) (*Withdrawn*)

0922-87-U: International Association of Machinists & Aerospace Workers, Local 1295 (Complainant) v. Gabriel of Canada Limited (Respondent) (*Withdrawn*)

0931-87-U: Pete Thompson (Complainant) v. Maple Leaf Mills Limited (Respondent) (*Withdrawn*)

0932-87-U: Stillmeadow Workers Association (Complainant) v. Maple Leaf Mills Limited (Respondent) (*Withdrawn*)

0997-87-U: Gregory Barrett (Complainant) v. Retail, Wholesale & Department Store Union (Respondent) v. Blue Line Taxi Co. Ltd., and Ottawa Taxi Owners & Brokers Association (Intervener) (*Dismissed*)

1053-87-U: St. Catharines Typographical Union No. 416 (Complainant) v. 570662 Ontario Limited c.o.b. as We're Econoprint Fast (Respondent) (*Withdrawn*)

1070-87-U: Ronald Simmons (Complainant) v. Canadian Brotherhood of Railway, Transport & General Workers, Local 268 (Respondent) v. D. A. Tilley (Intervener) (*Withdrawn*)

1083-87-U: United Brotherhood of Carpenters & Joiners of America, Local 1036 (Complainant) v. Wharton Industrial Developments Limited (Respondent) (*Withdrawn*)

1185-87-U: Windsor Mouldmakers Union, Local 1680 C.L.C., Windsor, Ontario (Complainant) v. International Tools Ltd., I. T. L. Industries Limited Tools Division (Respondent) (*Withdrawn*)

1187-87-U: United Food & Commercial Workers International Union, Local 175 AFL:CIO:CLC (Complainant) v. Purity Break (Lakehead) Inc. (Respondent) (*Withdrawn*)

1091-87-U: Labourers' International Union of North America, Local 1036 (Complainant) v. Lento Masonry Sault Ltd. (Respondent) (*Withdrawn*)

1231-87-U: Peter Lorne Clarke (Complainant) v. Energy & Chemical Workers Union, Local 11 (Respondent) v. Drug Trading Company Limited (Intervener) (*Dismissed*)

1292-87-U: Bakery, Confectionary & Tobacco Workers International Union, Local 264 (Complainant) v. Fibread Corporation (Respondent) (*Withdrawn*)

1406-87-U: United Food & Commercial Workers International Union, Local 175 (Complainant) v. Hockley Valley Resort Ltd. (Respondent) (*Withdrawn*)

1412-87-U: International Union of Operating Engineers, Local 793 (Complainant) v. Hub Equipment Limited (Respondent) (*Withdrawn*)

1439-87-U: Service Employees' Union, Local 219 (Complainant) v. Wymering Manor Ltd. (Respondent) (*Withdrawn*)

1446-87-U: Service Employees International Union, Local 204 (Complainant) v. The Governing Council of the University of Toronto (Respondent) (*Withdrawn*)

1453-87-U: Philip Johnston (Complainant) v. Donald Melvin (Respondent) (*Withdrawn*)

1465-87-U: National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada) (Complainant) v. Ionic Finishing Ltd. (Respondent) (*Withdrawn*)

1483-87-U: Winsome Nairne (Complainant) v. Datton Burton (Respondent) (*Withdrawn*)

1551-87-U: Service Employees Union, Local 183 (Complainant) v. Edward Street Manor Nursing Home (Respondent) (*Withdrawn*)

1583-87-U: Southern Ontario Newspaper Guild, Local 87 (Complainant) v. Metroland Printing, Publishing & Distributing, division of Harlequin Enterprises Limited (Respondent) (*Withdrawn*)

1630-87-U: United Food & Commercial Workers International Union, Local Union 175 (Complainant) v. 539747 Ontario Inc. (Respondent) (*Withdrawn*)

1647-87-U: Sheet Metal Workers' International Association, Local 30 (Complainant) v. 715470 Ontario Limited c.o.b. as C.F.M. Industries Limited (Respondent) (*Withdrawn*)

1666-87-U: Brian Gillard, Domenic Esposito, (Complainants) v. U.F.C.W. (Local 633) Trillium Meats Steinberg Inc. (Respondents) (*Withdrawn*)

1670-87-U: Jay Gulerya (Complainant) v. United Food & Commercial Workers International Union, Local 530 (Respondent) (*Withdrawn*)

1708-87-U: Guy Lalonde (Complainant) v. Loeb Inc., and Warehousemen, Transportation & General Workers Union, Local 715 (Respondents) (*Withdrawn*)

1711-87-U: Roberta Said (Complainant) v. Loblaws Supermarket, and United Food & Commercial Workers International Union, Local 1000A (Respondents) (*Withdrawn*)

1729-87-U: Graphic Communications International Union, Local 500M (Complainant) v. Reid Dominion Packaging Limited, Hamilton (Respondent) (*Withdrawn*)

1736-87-U: Christian Labour Association of Canada (Complainant) I.O.O.F. Senior Citizen Homes Incorporated (Respondent) (*Withdrawn*)

1739-87-U: Edward J. Faultless (Complainant) v. Frank Grimaldi - Teamsters Local 419 (Respondent) (*Withdrawn*)

1746-87-U: Service Employees Union, Local 183 (Complainant) v. Esard Street Manor Nursing Home (Respondent) (*Withdrawn*)

1811-87-U: Service Employees Union, Local 183 (Complainant) v. CareWell Cambellford Nursing Home (Respondent) (*Withdrawn*)

1837-87-U: Nick Laudadio (Complainant) v. Jim Lewis, Business Manager of Local 1036 of the Labourers' International Union (Sault Ste. Marie) (Respondent) (*Withdrawn*)

1857-87-U: Textile Processors, Service Trades, Health Care, Professional & Technical Employees Union, Local 351, and Dwight Hurdle (Complainant) v. Toronto Hilton Harbour Castle (Respondent) (*Withdrawn*)

1865-87-U: Labourers' International Union of North America, Local 527 (Complainant) v. Ottawa-Carleton Brick Laying & Masonry Limited (Respondent) (*Withdrawn*)

1884-87-U: United Steelworkers of America (Complainant) v. A & M Super Discount Marts Limited (Respondent) (*Withdrawn*)

1887-87-U: Service Employees' Union, Local 478 (Complainant) v. Empire Hotel Group Limited (Respondent) (*Withdrawn*)

1946-87-U: Jaime Mota (Complainant) v. CUPE, Local 1474 (Respondent) (*Withdrawn*)

1992-87-U: Jagdish Bhadauria (Complainant) v. Mary Templin, President, District 15, Ontario Secondary School Teachers Federation (Respondent) (*Dismissed*)

2013-87-U: Energy & Chemical Workers Union (Complainant) v. Halton Crushed Stone Ltd. (Respondent) (*Withdrawn*)

2025-87-U: German Cruces (Complainant) v. Arvin Automotive of Canada Ltd. (Respondent) (*Dismissed*)

2060-87-U: Gerald Lecuyer, Cash Podlewski, and John Polhill (Complainants) v. Canadian Paperworkers Union, Local 132 (Respondent) (*Withdrawn*)

2165-87-U: Kazimir Cigan (Complainant) v. Canadian Autoworkers Union, Local 444 (Respondent) (*Dismissed*)

2183-87-U: International Union of Operating Engineers, Local 793 (Complainant) v. Dufferin Construction Company (Respondent) (*Withdrawn*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

1270-87-M: U.R.W.A. (Complainant) v. Davidson Rubber Company Limited (Respondent) (*Withdrawn*)

JURISDICTIONAL DISPUTES

1710-87-JD: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Complainants) v. Catalytic Maintenance Inc., Petro-Canada Products, division of Petro-Canada Inc., and Energy & Chemical Workers Union, Local 593 (Respondents) (*Dismissed*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

2006-86-M: The Corporation of the City of Thunder Bay (Applicant) v. Ontario Nurses' Association (Respondent) (*Granted*)

1020-87-M: Service Employees Union, Local 183 (Applicant) v. Carewell Cambellford Nursing Home (Respondent) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH & SAFETY ACT

0458-86-OH: Glen Fowler (Complainant) v. Pat Lee, Assistant Administrator (Respondent) (*Withdrawn*)

1359-87-OH: Rosemary Ramsay (Complainant) v. Chembond Industries (Respondent) (*Withdrawn*)

1676-87-OH: Betty Payie (Complainant) v. Lindsay Dry Cleaners & Ivan Rodd (Respondents) (*Withdrawn*)

1700-87-OH: Canadian Union of Public Employees, Local 54 (Complainant) v. Town of Ajax (Respondent) (*Withdrawn*)

1955-87-OH: Edmondson, N. (Complainant) v. Four Valley (Respondent) (*Withdrawn*)

2073-87-OH: Mike Ryann (Complainant) v. Accuride Canada Inc. (Respondent) (*Withdrawn*)

2074-87-OH: Stephen Avery (Complainant) v. Accuride Canada Inc. (Respondent) (*Withdrawn*)

2075-87-OH: Dan Cook (Complainant) v. Accuride Canada Inc. (Respondent) (*Withdrawn*)

2076-87-OH: David Findlater (Complainant) v. Accuride Canada Inc. (Respondent) (*Withdrawn*)

2077-87-OH: David McLean (Complainant) v. Accuride Canada Inc. (Respondent) (*Withdrawn*)

2078-87-OH: Ian Chipperfield (Complainant) v. Accuride Canada Inc. (Respondent) (*Withdrawn*)

2079-87-OH: Evan Horton (Complainant) v. Accuride Canada Inc. (Respondent) (*Withdrawn*)

2080-87-OH: Jim Hagen (Complainant) v. Accuride Canada Inc. (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

2169-84-M; 2170-84-M; 2171-84-M: Carpenters' District Council of Toronto & Vicinity on behalf of United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Hardrock Forming Company (Respondent) (*Withdrawn*)

3523-86-M: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. E. M. Carpentry (Respondent) (*Granted*)

0557-87-G: Labourers' International Union of North America, Local 527 (Applicant) v. Eastern Construction Ltd. (Respondent) (*Withdrawn*)

0958-87-G: International Union of Operating Engineers, Local 793 (Applicant) v. Lundrigans Construction Ltd. (Respondent) (*Withdrawn*)

1131-87-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. E. M. Carpentry (Respondent) (*Granted*)

1214-87-G: Labourers' International Union of North America, Local 493 (Applicant) v. J.D.S. Investments Ltd. (Respondent) (*Withdrawn*)

1256-87-G: Ben Plastering Limited, c.o.b. as Belmont Plastering Co. (Applicant) v. Drywall, Acoustic, Lathing & Insulation, Local 675, United Brotherhood of Carpenters & Joiners of America (Respondent) (*Granted*)

1381-87-G: Labourers' International Union of North America, Local 607 (Applicant) v. Lundrigans Const. Ltd. (Respondent) (*Withdrawn*)

1643-87-G: Ontario Provincial Conference, International Union of Bricklayers & Allied Craftsmen, Local 7 Canada (Applicant) v. Joe Arban Contractor Limited (Respondent) (*Granted*)

1674-87-G: Labourers' International Union of North America, Local 493 (Applicant) v. P. B. Rombough Ltd. (Respondent) (*Withdrawn*)

1686-87-G: International Association of Bridge, Structural & Ornamental Iron Workers, Local 721 (Applicant) v. Thunderbird Erectors (Respondent) (*Granted*)

1810-87-G: United Brotherhood of Carpenters & Joiners of America, Local 2041 (Applicant) v. Torfax Drywall (Respondent) (*Granted*)

1818-87-G: Labourers' International Union of North America, Local 183 (Applicant) v. Power Pac Construction Ltd. (Respondent) (*Withdrawn*)

1826-87-G: International Association of Bridge, Structural & Ornamental Iron Workers, Local 721 (Applicant) v. Habit Steel Construction (Respondent) (*Granted*)

1836-87-G: International Union of Operating Engineers, Local 793 (Applicant) v. Runnymede Development Corp. Ltd. (Respondent) (*Granted*)

1858-87-G: International Association of Bridge, Structural & Ornamental Ironworkers, Local 759 (Applicant) v. E. S. Fox Ltd. (Respondent) (*Withdrawn*)

1907-87-G: United Brotherhood of Carpenters & Joiners of America, Local 785 (Applicant) v. Suburban Lathing & Acoustics Ltd. (Respondent) (*Withdrawn*)

1918-87-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 46 (Applicant) v. Van Mechanical Contractors Ltd. (Respondent) (*Granted*)

1935-87-G: Labourers' International Union of North America, Local 183 (Applicant) v. Hollingworth Drain Services Ltd. (Respondent) (*Withdrawn*)

1980-87-U: Spruce Falls Power & Paper Company Limited, and Kimberly-Clark of Canada Limited (Complainants) v. International Brotherhood of Electrical Workers, Local 1149 (Respondent) (*Withdrawn*)

1991-87-G: United Brotherhood of Carpenters & Joiners of America, Local 27 (Applicant) v. Kordun Developments Inc. (Respondent) (*Granted*)

2010-87-G: United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. Nu-Style Construction Ltd. (Respondent) (*Granted*)

2020-87-G: International Association of Bridge, Structural & Ornamental Iron Workers, Local 721 (Applicant) v. Habit Steel Construction (Respondent) (*Withdrawn*)

2082-87-G: International Association of Heat & Frost Insulators & Asbestos Workers, Local 95 (Applicant) v. Econ Insulation Ltd. (Respondent) (*Withdrawn*)

2083-87-G: International Association of Heat & Frost Insulators & Asbestos Workers, Local 95 (Applicant) v. Feer Insulation Ltd. (Respondent) (*Withdrawn*)

2084-87-G: International Association of Heat & Frost Insulators & Asbestos Workers, Local 95 (Applicant) v. Landar Insulation Corporation Ltd. (Respondent) (*Withdrawn*)

2086-87-G: International Association of Heat & Frost Insulators & Asbestos Workers, Local 95 (Applicant) v. M. Lesko Insulation (Respondent) (*Withdrawn*)

2087-87-G: International Association of Heat & Frost Insulators & Asbestos Workers, Local 95 (Applicant) v. McBrien Insulation (Respondent) (*Withdrawn*)

2088-87-G: International Association of Heat & Frost Insulators & Asbestos Workers, Local 95 (Applicant) v. Metro Insulation Co. (Respondent) (*Withdrawn*)

2089-87-G: International Association of Heat & Frost Insulators & Asbestos Workers, Local 95 (Applicant) v. Richardson Bros. Insulation Co. Ltd. (Respondent) (*Withdrawn*)

2098-87-G: United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Siege Ducharme Ltée., and Produits Ducharme Ltée. (Respondents) (*Withdrawn*)

2099-87-G: Local 47, Sheet Metal Workers' International Association (Applicant) v. Aluminum Specialties Ontario Limited (Respondent) (*Granted*)

2104-87-G: Labourers' International Union of North America, Local 837 (Applicant) v. Traugott Construction Limited (Respondent) (*Granted*)

2124-87-G: International Union of Operating Engineers, Local 793 (Applicant) v. Bandiera & Associates Inc. (Respondent) (*Withdrawn*)

2125-87-G: International Union of Operating Engineers, Local 793, (Applicant) v. Lyons Building Center (Ready-Mix) (Respondent) (*Withdrawn*)

2132-87-G: International Union of Operating Engineers, Local 793 (Applicant) v. James A. Rice Limited (Respondent) (*Withdrawn*)

2134-87-G: Labourers' International Union of North America, Local 493 (Applicant) v. J.D.S. Investments Ltd. (Respondent) (*Withdrawn*)

2154-87-G: International Union of Operating Engineers, Local 793 (Applicant) v. S.C.A.I. Construction (division of 639739 Ontario Ltd.) (Respondent) (*Granted*)

2166-87-G: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 800 (Applicant) v. Canmec Mechanical Contractors Limited (Respondent) (*Withdrawn*)

2178-87-G: Labourers' International Union of North America, Local 183 (Applicant) v. Concord Concrete & Drain (Respondent) (*Withdrawn*)

2180-87-G: Labourers' International Union of North America, Local 183 (Applicant) v. Steele's Welding Co. (Respondent) (*Withdrawn*)

2182-87-G: Labourers' International Union of North America, Local 183 (Applicant) v. The Atlas Corporation (Respondent) (*Withdrawn*)

2198-87-G: Labourers' International Union of North America, Local 183 (Applicant) v. Montejunto Const. Inc. (Respondent) (*Withdrawn*)

2199-87-G: Labourers' International Union of North America, Local 183 (Applicant) v. Bora Investments (Respondent) (*Withdrawn*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

2636-85-R: International Union of Operating Engineers, Local 793 (Applicant) v. U D M Excavating & Contracting Ltd. (Respondent) (*Dismissed*)

2352-86-M: International Brotherhood of Electrical Workers, Local 530 (Applicant) v. Ellis-Don Limited (Respondent) (*Dismissed*)

2714-86-M: United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 663 (Applicant) v. Ellis-Don Limited (Respondent) (*Dismissed*)

2715-86-M: Sheet Metal Workers' International Association, Local 539 (Applicant) v. Ellis-Don Limited (Respondent) (*Dismissed*)

0395-87-OH: James Jefferson (Complainant) v. Pumps & Softeners Ltd. (Respondent) (*Granted*)

1688-87-R: Ontario Liquor Board Employees' Union (Applicant) v. Blue Water Bridge Duty Free Shop Inc. (Respondent) (*Dismissed*)

RIGHT OF ACCESS

2051-87-M: International Union of Operating Engineers, Local 793 (Applicant) v. Ledcore Industries Limited (Respondent) (*Granted*)

*Ontario Labour Relations Board,
400 University Avenue,
Toronto, Ontario
M7A 1V4*

ISSN 0383-4778

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ONTARIO LABOUR RELATIONS BOARD REPORTS

Annual Consolidated Index 1987



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ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Annual Consolidated Index 1987

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Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.

Typeset, Printed and Bound by Union Labour in Ontario

CASES REPORTED 1987

L'Abbe Construction (Ontario) Ltd.; Re L.I.U.N.A., Local 527; Re Canadian Construction, Building Maintenance and General Workers' Union (N.C.C.L.)..... (Oct.)	1191
Abramowitz, J. and B. Lyons, et al.; Re O.P.S.E.U., The Ontario Council of Regents for Colleges of Applied Arts and Technology, and The Board of Governors, Sheridan College of Applied Arts and Technology..... (Apr.)	455
Acme Building and Construction Limited; Re P.A.T., Local 1671 and Arthur Verners..... (Feb)	179
Ajax, The Town of; Re C.U.P.E., Local 54 (Sept.)	1117
Algoma Steel Corporation, Limited, The; Re Algoma Steel Front-Line Foremen Association; Re U.S.W.A. and U.S.W.A., Locals 2251, 4509, 5595, 2251, 2288..... (Nov.)	1341
All Type Metal Stamping Limited; Re Teamsters' Union, Local 879; Re Group of Employees (Feb.)	181
Alma College; Re O.S.S.T.F. (Dec.)	1453
Almonte Nursing Home; Re U.F.C.W. (July)	945
Anderson's City Farm Valu-Mart; Re U.F.C.W., Local 1000A..... (Jan.)	1
Andrew Fleck Child Centre, Ottawa Day Nursery Inc. c.o.b. as; Re O.P.S.E.U. (Jan.)	5
Angus J. MacKinnon Consultants Limited, A.J. MacKinnon & Associates; Re L.I.U.N.A., Ontario Provincial District Council..... (Oct.)	1204
Arlington Crane Service Limited; Re I.U.O.E., Local 793; Re Operating Engineers Employer Bargaining Agency (Jan.)	7
Armbo Materials and Construction Limited, and L.I.U.N.A., Local 183; Re U.A., Local 599; Re I.U.O.E., Local 793; Re Metropolitan Toronto Sewer and Watermain Contractors Association (July)	948
Ault Foods Limited; Re U.F.C.W., Local 175 (Jan.)	12
A. Vukovic Forming Co., Anton Vukovic c.o.b. as; Re L.I.U.N.A., Local 527; Re Richard Loop..... (Mar.)	311
Babcock and Wilcox Canada Ltd.; Re Quality Control Council of Canada (Aug.)	1053
Balanyk, Elizabeth; Re ONA; Re Greater Niagara General Hospital, et al. (Sept.)	1121
Baranowski, Michael; Re Teamsters' Union, Local 938 and TNT Canda Inc., c.o.b. as TNT Railfast (May)	645
Beacon Transit Lines Incorporated; Re Teamsters' Union, Local 938 (Oct.)	1206
Belair Restoration (Ontario) Inc.; Re O.P.C.M., Local 172; Re Group of Employees (Feb.)	183
Belmont Plastering Co., Ben Plastering Limited, c.o.b. as; Re Drywall, Acoustic, Lathing and Insulation, Local 675, C.J.A. (Nov.)	1347
Black & McDonald Limited; Re S.M.W. (Oct.)	1208
Blair, Winston Alfonso; Re U.S.W.A.; Re Midas Canada Inc. and International Parts Manufacturing Limited..... (Oct.)	1211

Blue Line Taxi Ltd.; Re Gregory Barrett; Re The Corporation of the City of Ottawa	(Apr.)	470
Brantco Construction; Re L.I.U.N.A., Local 1059; Re Group of Employees.....	(Apr.)	472
Brantford, The Corporation of the City of; Re Local Union No. 582, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO; Re C.U.P.E.....	(Sept.)	1125
Brink's Canada Limited and A.T.M. Automatic Teller Machines Services Ltd.; Re Teamsters' Union, Local 419	(May)	647
Broome, Terrence; Re C.J.A., Local 1316	(Jan.)	13
Brown Boveri Howden Inc.; Re U.A.; Re E.P.S.C.A.; Re M.C.A.O.; Re Nicholls Radtke Ltd.; Re State Contractors Inc.; Re Watts & Henderson Ltd.	(Mar.)	316
Burlington Air Express (Canada) Ltd.; Re T.T.U. No. 91	(Aug.)	1056
Burlington Northern Air Freight (Canada) Ltd.; Re T.T.U., Local 91; Re Rick Best	(Aug.)	1064
Burl-Oak Paving Ltd.; Re L.I.U.N.A., Local 183; Re Group of Employees	(Apr.)	474
Cambridge Canadian Foods Inc.; Re U.F.C.W., Local 1000A; Re Group of Employees	(Mar.)	319
Canada Dry Bottling Company Ltd.; Re U.F.C.W.; Re Group of Employees.....	(Mar.)	337
Can-Eng Metal Treating Ltd.; Re C.A.W.; Re Group of Employees	(Mar.)	340
Carleton Roman Catholic Separate School Board; Re Ontario Catholic Occasional Teachers' Association	(Jan.)	18
Carter, Doug, et al.; Re C.A.W., Local 27; Re Highbury Ford Sales Limited	(Mar.)	343
Catalyst Technology (Canada) Ltd.; Re B.B.F., Local 128	(June)	803
Catalyst Technology (Canada) Ltd.; Re B.B.F. Lodge 128; Re Boilermaker Contractors' Association	(Sept.)	1131
Catalytic Maintenance Inc.; Re L.I.U.N.A., Local 1089	(Dec.)	1479
Catalytic Maintenance Inc., Petro-Canada Products, A Division of Petro-Canada Inc., and E.C.W.U., Local 593; Re U.A., Local 46	(Nov.)	1353
Caterpillar of Canada Ltd.; Re C.A.W.; Re Group of Employees	(Feb.)	192
Caterpillar of Canada Ltd.; Re C.A.W.; Re Group of Employees	(Jan.)	27
C.E. Jamieson & Co. (Dominion) Limited; Re Hakim Samad; Re E.C.W.U.....	(July)	953
City Cab, ABC Taxi (Brockville) Ltd., and Safedrive Inc., c.o.b. as; Re Mohinder Gill; Re R.W.D.S.U.; Re Group of Employees.....	(July)	955
City Plumbing (Kitchener) Limited; Re Richard Grandy; Re The Ontario Pipe Trades Council of the U.A., Local 527	(June)	810
Cobi Foods Inc.; Re U.F.C.W.....	(June)	815
Coca-Cola Ltd.; Re Independent Local 385; Re B.F.C.S.D. and its Local 385 and the U.F.C.W.	(May)	658
Co-Fo Concrete Forming Construction Limited; Re Jorge Silva; Re L.I.U.N.A., Local 1059	(June)	828

Co-Fo Concrete Forming Construction Limited; Re L.I.U.N.A., Local 1059	(Oct.)	1213
Commonwealth Construction Company, A Division of Guy F. Atkinson Ltd.; Re Ralph Marion et al.	(July)	961
Comstock International Ltd.; Re B.B.F., Local 128	(May)	667
Concorde Metal Stampings; Re C.A.W.; Re Group of Employees	(Jan.)	34
Connie Steel Products Limited; Re Leonardo Delprete, et al.; Re B.S.O.I.W., Shopmen's Local Union No. 834	(Oct.)	1225
Connolly, Michael and Ucal Powell; Re C.J.A., Local 27	(Feb.)	193
Consolidated Aluminium (Maritimes) Ltd.; Re P.A.T., Local 1824; Re Consolidated Aluminum & Glass Corp.	(Mar.)	350
Construction Association of Thunder Bay Inc., General Contractors' Division of the; Re Lumber and Sawmill Workers' Union, Local 2693 of C.J.A. and L.I.U.N.A., Local 607, and L.I.U.N.A. Ontario Provincial District Council; Re Ontario Provincial Council C.J.A.	(July)	976
Consumers Distributing Company Limited, Teamsters' Union, Local 419 and Sean Floyd; Re Ghiansaroop Persaud	(May)	673
Copper Cliff Mechanical Contractors Ltd.; Re Millwright District Council on behalf of Local 1425; Re Ironworkers District Council, B.S.O.I.W., Local 786	(Nov.)	1357
Corecon Construction Limited; Re C.J.A., Local 27; Re Employees of Corecon Construction	(Dec.)	1480
Costa, Maria Fatima; Re L.I.U.N.A., Local 183; Re Burlington Canada Inc.	(Feb.)	199
Countryside Farms Limited; Re I.U.O.E., Local 793	(Nov.)	1365
County Electric of Peterborough Limited; Re I.B.E.W., Local 894; Re Group of Employees	(Dec.)	1485
Craddock, John, et al.; Re U.A., Local 527	(Dec.)	1488
Current River Foods Ltd.; Re Laura Godin; Re U.F.C.W., Local 409	(May)	684
Dagmar Construction Limited; Re L.I.U.N.A.	(Apr.)	480
D'Alessandro, Luciano and Donato Marinaro; Re L.I.U.N.A., Local 1089, and Rocco D'Andrea	(July)	986
Daniell, John; Re Teamsters' Union	(July)	990
Darrow Developments Ltd.; Re L.I.U.N.A., Ontario Provincial District Council	(Oct.)	1238
Delco Contractors, 608322 Ontario Inc.; Re C.J.A., Local 494	(June)	830
D.E. Witmer Plumbing and Heating Limited; Re U.A., Local 527; Re Group of Employees; Re Bill Hennink and Bill Bonvanie	(Oct.)	1228
Di Cesare, Salvatore; Re R.W.D.S.U., Local 414; Re Dom Group	(May)	692
Domtar Inc.; Re C.P.U.	(Apr.)	485
Domtar Inc., Domtar Forest Products, Woodlands Division; Re IWA; Re Lumber and Sawmill Workers Union, Local 2693 of the C.J.A.; Re C.P.U.	(Sept.)	1132

Dresser Canada, Inc.; Re CAW; Re Group of Employees; Re U.S.W.A.	(Oct.)	1243
Easy Enterprises Inc.; Re Charlene Banwait; Re Laundry and Linen Drivers and Industrial Workers Union, Teamsters Local 847	(July)	994
E & E Seegmiller Limited; Re L.I.U.N.A., Local 493; Re I.U.O.E., Local 793	(Jan.)	41
Eighty-Five Electric, Raymond Brisson c.o.b. as, and Richard Tominski c.o.b. as R.T. Electric; Re I.B.E.W., Local 1687.....	(June)	833
EKT Industries Inc.; Re Lumber and Sawmill Workers Union, Local 2693 of C.J.A.; Re I.U.O.E., Local 793; Re C.J.A., Local 1669; Re L.I.U.N.A., Ontario Provincial District Council, L.I.U.N.A., Local 607; Re Tamarron Group Inc.; Re Tamarron Construction Limited (Mar.)		352
EKT Industries Inc.; Re Lumber and Sawmill Workers Union, Local 2693 of C.J.A.; Re I.U.O.E., Local 793; Re C.J.A., Local 1669; Re L.I.U.N.A., Ontario Provincial District Council and L.I.U.N.A., Local 607; Re EKT Industries Inc., Tamarron Group Inc., Tamarron Construction Limited	(May)	696
Electrical Power Systems Construction Association, The; Re B.S.O.I.W.	(Aug.)	1079
Electrical Power Systems Construction Association, Ontario Hydro, B.S.O.I.W., Local 721 and B.B.F., Local 128; Re Ontario Sheet Metal Workers' Conference and S.M.W., Local No. 30.....	(Apr.)	487
Elgin Construction Company Limited; Re L.I.U.N.A., Ontario Provincial District Council; Re Group of Employees	(Jan.)	45
Elgin Handles Limited; Re Teamsters' Union, Local No. 141; Re Group of Employees	(Apr.)	496
Elmont Construction Limited, et al.; Re Toronto-Central Ontario Building and Construction Trades Council and B.A.C., Local 2	(Feb.)	209
Etna Foods of Windsor Limited; Re Great Lakes Fishermen and Allied Workers' Union ...	(Feb.)	210
Fitzhenry and Whiteside Limited; Re T.T.U., Local 91 and Nelson Roland.....	(Apr.)	504
Formula Plastics Inc.; Re U.F.C.W.	(May)	702
Fry, Brian; Re Teamsters Union, Local 419.....	(Mar.)	365
Gallant Painting, Jette Pedersen c.o.b. as; Re P.A.T., Local 1590; Re Group of Employees	(Mar.)	367
Gallant Painting; Jette Pedersen c.o.b. as; Re P.A.T., Local 1590; Re Group of Employees	(Mar.)	372
Gaston H. Poulin Contractor Limited; Re I.U.O.E., Local 793	(Jan.)	48
Gaston H. Poulin Contractor Limited; Re I.U.O.E., Local 793	(Feb.)	219
Gattellaro, Domenic; Re U.A.W., Local 222; Re Cadbury Canada Marketing Inc.	(June)	844
Gilvesy Enterprises Inc.; Re P.A.T., Local 1891	(Feb.)	220
Globe and Mail, The, Division of Canadian Newspapers Company Limited; Re Southern Ontario Newspaper Guild, Local 87 The Newspaper Guild	(Nov.)	1368
Grand River Conservation Authority; Re O.P.S.E.U.	(Nov.)	1371

Great Atlantic & Pacific Company of Canada, Limited; Re Glen Cullen; Re R.W.D.S.U., Local 414; Re Mr. Peter Cleary, et al.	(May)	714
Great Lakes Forest Products Ltd. (Lakehead Woodlands Division); Re I.W.A. Canadian Regional Council No. 1; Re C.P.U.; Re Lumber and Sawmill Workers' Union	(Sept.)	1136
Great West Timber Limited; Re C.P.U.; Re Lumber and Sawmill Workers' Union, Local 2693 of C.J.A.....	(Jan.)	51
Grey Bruce Regional Health Centre; Re ONA	(July)	996
Grey County Homes for the Aged, The Corporation of the County of Grey operating as; Re London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C.	(Apr.)	508
Habib, Joseph E.; Re General Motors of Canada Limited; Re U.A.W., Local 1973	(Dec.)	1501
Haley Industries Limited; Re U.S.W.A.; Re Group of Employees	(Mar.)	373
Hamilton, The Board of Education for the City of; Re O.P.S.T.F.; Re O.S.S.T.F.	(June)	847
Hamilton Yellow Cab Company Limited; Re R.W.D.S.U.	(Nov.)	1373
Hardrock Forming Company, 270915 Ontario Limited, and 556347 Ontario Limited c.o.b. as, Delform Construction Limited, Ilena Construction Limited; Re The Form Council of Ontario, and L.I.U.N.A., Local 183; Re Carpenters' District Council of Toronto and Vicinity on behalf of Carpenters Local Union 27, C.J.A., The Ironworkers District Council of Ontario, and B.S.O.I.W., Local 721.....	(July)	1003
Harlequin Enterprises Limited; Re The Southern Ontario Newspaper Guild, Local 87, Newspaper Guild	(Feb.)	226
Harnden & King Construction Ltd.; Re I.U.O.E., Local 793; Re Group of Employees	(Dec.)	1510
Hayloft Steakhouse Limited; Re U.F.C.W., Local 175; Re Group of Employees.....	(May)	717
H & D Construction, Mancheneel Investments Limited c.o.b. as, and MIHU Holdings Limited; Re I.U.O.E., Local 793; Re L.I.U.N.A., Local 183	(Dec.)	1495
Hemco Developments Limited; Re The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, C.J.A.....	(June)	852
Herbie's Drug Warehouse Limited; Re U.S.W.A.; Re Group of Employees	(Nov.)	1393
Hinkson, George; Re Canadian Conference of Teamsters, Chemical, Energy & Allied Workers Division, Local 2177; Re BASF Inmont Canada Inc.	(Oct.)	1246
Hollingworth Drain Services; Re C.J.A., Local 27	(Oct.)	1250
Hoosain, Tony; Re District Council C.J.A.; Re C.J.A., Local 27.....	(Dec.)	1513
Howes, Howard J.; Re U.S.W.A., Local 8222; Re Duomatic Olsen Inc.	(Jan.)	55
Huntsville I.G.A.; Re Cecil DeHaan; Re U.F.C.W., Locals 633 and 175.....	(Dec.)	1517
Huron Steel Fabricators (London) Limited; Re Paul Petrus; Re C.J.A., Local 3054.....	(Dec.)	1522
I.B.L. Industries Limited; Re C.A.W.; Re Group of Employees	(Sept.)	1144
Independent Plumbing & Heating Contractors Association; Re U.A., Local 46; Re Metropolitan Plumbing & Heating Contractors' Association	(May)	734

Imperial Clevite Canada Inc.; Re Bernard John Moore; Re I.A.M., Local 1975; Re Group of Employees	(Mar.)	375
Ivaco Inc., Ivaco Rolling Mills, Division of; Re U.S.W.A.	(Apr.)	511
Jacmorr Manufacturing Limited; Re U.F.C.W.	(Aug.)	1086
J.C. Electric, John Anthony Waite c.o.b. as; Re I.B.E.W., Local 1687	(Oct.)	1251
J.H. Lock & Sons Limited; Re U.A., Local 787	(Jan.)	62
J.M. Schneider Inc., Link Services Inc.; Re The Schneider-Link Office Employees' Association	(Mar.)	381
Johnson Matthey Limited, Rembrandt Jewelry Manufacturing, a Division of; Re Bruno Fiorini; Re U.S.W.A., District #6	(Apr.)	518
Juvenile Detention (Niagara) Inc.; Re O.P.S.E.U.	(Jan.)	66
KBM Forestry Consultants Inc., The Crown in Right of Ontario as represented by the Ministry of Natural Resources and; Re O.P.S.E.U.	(Mar.)	399
KBM Forestry Consultants Inc., The Crown in Right of Ontario as represented by the Ministry of Natural Resources and; Re O.P.S.E.U.	(July)	1007
Keswick I.G.A., H.W. Gluck c.o.b. as; Re U.F.C.W. Local 633; Re Group of Employees. (Nov.)		1395
Kimberly Clark of Canada Inc.; Re Lumber and Sawmill Workers' Union, Local 2693	(Oct.)	1255
King Nursing Home Ltd.; Re C.L.A.C.	(Oct.)	1257
Kirouac Contracting Ltd.; Re I.W.A.; Re Lumber and Sawmill Workers Union, Local 2693 of the C.J.A.; Re C.P.U.	(Oct.)	1262
Knob Hill Farms Limited; Re U.F.C.W., Local 206; Re Group of Employees	(Dec.)	1531
Krush, John Katsuras c.o.b. as; Re Local 280 of the International Beverage Dispensers' & Bartenders' Union of the Hotel and Restaurant Employees' and Bartenders' International Union	(June)	859
Labourers' International Union of North America, Local 527, Andre Roy and; Re C.J.A., Local 93	(Apr.)	523
Laidlaw Waste Systems Ltd.; Re Teamsters' Union, Local 419; Re L.I.U.N.A., Oil and Gas Technicians, Service, Domestic & General Workers Union, Local 1267	(Oct.)	1267
Lakehead District Roman Catholic Separate School Board, The; Re O.C.O.T.A.; Re The Nipissing District Roman Catholic Separate School Board	(Sept.)	1154
Lambton County Board of Education, The, C.U.P.E., Local 1019 and; Re Betty Jean Luno	(Oct.)	1277
Lapalme Nursing Home Ltd.; Re C.U.P.E.; Re Group of Employees	(Mar.)	406
Laval Tool & Mould Inc.; Re Windsor Mouldmakers Union, Local 1680, C.L.C.; Re Group of Employees	(Oct.)	1281
Lecours Lumber Company Limited; Re I.W.A.	(Oct.)	1286
Lecuyer, Gerald, et al.; Re C.P.U., Local 132 and C.P.U.; Re Abitibi-Price Inc.	(Apr.)	529
Ledcore Industries Limited; Re I.U.O.E., Local 793	(Nov.)	1399

Ledcor Industries Ltd. and Castonguay Blasting Ltd.; Re L.I.U.N.A., Local 607	(Dec.)	1554
Les Ingenieries Consbec Inc.; Re I.U.O.E., Local 796; Re L.I.U.N.A., Ontario Provincial District Council, L.I.U.N.A., Local 607	(Nov.)	1402
Liebman, Jean; Re York University Staff Association and York University	(July)	1011
London, Board of Education for the City of; Re O.P.S.T.F.; Re F.W.T.A.O.	(Feb.)	235
London Soap Company Limited; Re London and District Service Workers' Union, Local 220; Re Group of Employees	(Feb.)	241
Lorne's Electric, 291360 Ontario Limited c.o.b. as; Re I.B.E.W., Locals 586 and 594	(Nov.)	1405
Lumber and Sawmill Workers' Union, Local 2693 of the C.J.A.; Re L.I.U.N.A., Ontario Provincial District Council; Re L.I.U.N.A., Local 607; Re C.J.A., Ontario Provincial Council; Re Ontario Provincial Conference of the B.A.C.; Re I.U.O.E., Local 793; Re O.G.C.A.; Re Construction Association of Thunder Bay Inc.	(Dec.)	1556
MacMillan Bathurst Inc.; Re C.P.U., Local 1497, et al.	(Dec.)	1568
Madeleine Mines Ltd.; Re I.U.O.E., Local 793	(Dec.)	1574
Magna International Inc., COSMA, a Division of, Millwrights Unlimited, Association of Millwrighting Contractors of Ontario Inc., C.J.A., Local 1916, M.C.A.O.; Re Ontario Pipe Trades Council of the U.A. and U.A., Local 67	(May)	742
Marks, Eugene; Re U.F.C.W., Local 617	(June)	872
Masstron Scale Ltd. and Toledo Scale Division of Reliance Electric Limited; Re I.A.M.	(Dec.)	1578
McLeod, Raymond; Re Camco Inc. and U.E., Local 550	(Apr.)	547
Menkes Developments Inc.; Re L.I.U.N.A., Local 506; Re L.I.U.N.A., Local 183	(June)	881
Menkes Developments Inc.; Re L.I.U.N.A., Local 506; Re L.I.U.N.A., Local 183	(Oct.)	1290
Metropolitan Life Insurance Company; Re I.U.O.E., Local 796; Re Allen Maintenance Ltd.	(Mar.)	413
Metropolitan Plumbing and Heating Contractors Association; Re U.A., Local 46 (Residential Division); Re Toronto Home Builders' Association	(May)	745
Michipicoten, The Corporation of the Township of; Re U.S.W.A.; Re William A. Lamon.	(Nov.)	1419
Ming Sun Holdings Inc.; Re L.I.U.N.A., Local 506	(Dec.)	1585
MIS (Canada) Holdings Ltd.; Re E.C.W.U.; Re Group of Employees	(June)	865
Mississauga Public Library Board; Re C.P.U.	(Apr.)	554
M.L.S. Cable Installations Inc.; Re I.B.E.W., Local 353; Re Group of Employees	(Nov.)	1413
Mobil Chemical Canada, Ltd.; Re E.C.W.U.	(Apr.)	559
Mollenhauer Limited; Re C.J.A., Local 27; Re L.I.U.N.A., Local 183; Re MTABA; Re Ellis-Don Limited; Re The Formwork Council of Ontario; Re Milne & Nicholls Ltd.	(Sept.)	1156
Mollenhauer Limited; Re C.J.A., Local 27; Re L.I.U.N.A., Local 183; Re M.T.A.B.A.; Re Ellis-Don Limited; Re The Form Work Council of Ontario; Re Milne & Nicholls Ltd.	(Oct.)	1294
Morewood Industries Limited; Re C.J.A., General Workers' Union, Local 1030	(Jan.)	92

Nadrofsky Corporation; Re I.U.O.E., Local 793	(May)	747
National Protective Service Company Limited; Re U.P.G.W.A., Local 1962.....	(Feb.)	245
National Trust; Re Union of Bank Employees (Ontario), Local 2104, C.L.C.; Re Group of Employees	(Jan.)	108
New Holiday Tavern, The Holiday (A Partnership), Holiday Entertainment Inc. (General Partner), Formerly Harvey Weisfeld and Alan Charney, c.o.b. as; Re International Beverage Dispensers and Bartenders Union, Local 280	(May)	753
Niagara Mechanical Contractors Limited, U.A., Local 46 and Chris Thurrott; Re L.I.U.N.A., Local 506	(Oct.)	1295
Nimel Construction Limited; Re C.J.A., Local 27; Re L.I.U.N.A., Local 183	(Oct.)	1299
Norris Transport Limited; Re Teamsters' Union, Local 879	(Apr.)	570
North American Plastics Company Limited, Peter Walker, et al.; Re Marie V. Roy.....	(Feb.)	251
North York, Board of Education for the City of; Re O.P.S.E.U.; O.S.S.T.F.....	(Jan.)	116
Northern and Central Gas Corporation Limited; Re U.A., Local 800; Re Group of Employees	(June)	887
Oakridge Villa Nursing Home; Re ONA; Re Extendicare Health Services Inc.	(July)	1026
Olympia Floor & Wall Tile Company, Olympia & York Developments Limited, c.o.b. as; Re L.I.U.N.A., Local 183; Re Group of Employees	(May)	762
Omstead Foods Limited; Re Great Lakes Fishermen and Allied Workers' Union	(Feb.)	264
Ontario Engineered Suspensions (Blenheim) Ltd.; Re C.A.W.	(May)	768
Ontario Hydro, E.P.S.C.A. and; Re B.S.O.I.W.	(Apr.)	574
Ontario Hydro, E.P.S.C.A. and; Re I.B.E.W., Local 1788	(Apr.)	589
Ontario Hydro and E.P.S.C.A.; Re U.A. and U.A., Local 463	(June)	899
Ontario Hydro (Line Work - Tweed Area Office); Re C.U.P.E.-C.L.C., Ontario Hydro Employees Union, Local 1000; Re McBeath Brothers Contracting	(June)	915
Ontario Hydro; Re The Society of Ontario Hydro Professional and Administrative Employees; Re C.U.P.E.-C.L.C. Ontario Hydro Employees Union Local 1000; Re The Coalition to Stop the Certification of the Society, on behalf of certain objecting employees, and Tom Stevens	(Dec.)	1589
Ontario Hydro; Re The Society of Ontario Hydro Professional and Administrative Employees; Re C.U.P.E.-C.L.C. Ontario Hydro Employees Union, Local 1000; Re Groups of Employees	(Mar.)	419
Ottawa Citizen, The, A Division of Southam Inc.; Re Ontario Newspaper Guild, Local 205	(Aug.)	1098
Ottawa Structural Concrete Services Ltd.; Re L.I.U.N.A., Local 527	(Dec.)	1599
Pebra Peterborough Inc.; Re Pebra Peterborough Employees Association; Re C.A.W.	(Mar.)	421
Peel Board of Education, The; Re O.S.S.T.F.	(July)	1030
Peel Board of Education, The; Re O.S.S.T.F.	(Dec.)	1600

Peralta Foods - Ilda C., 538391 Ontario Limited c.o.b. as, and Vito Peralta; Re Great Lakes Fishermen and Allied Workers' Union.....	(Sept.)	1162
Pickering Welding & Steel Supply, Kenoyd Limited trading as; Re U.S.W.A.	(Apr.)	595
Pickering Welding & Steel Supply, Kenoyd Limited trading as; Re U.S.W.A.	(June)	923
Piggott Construction Limited; Re I.U.O.E., Local 793	(Apr.)	599
Porcupine General Hospital; Re O.N.A.; Re Group of Employees	(Mar.)	423
Public Service Alliance of Canada; Re Alliance Employees' Union; Re The Ottawa Typographical Union, Local 102	(Feb.)	265
Quaker Oats Company of Canada Limited, The; Re Quaker Oats Employees Independent Union (Cereals); Re U.F.C.W., Local 293	(Dec.)	1602
Queen's University at Kingston; Re O.P.S.E.U.; Re C.U.P.E.	(June)	925
Rexwood Products Limited; Re Lumber and Sawmill Workers' Union, Local 2995 of the C.J.A.	(Feb.)	267
Richard D. Steele Construction (1979) Ltd.; Re C.J.A., Local 1030	(Aug.)	1110
Ridsdale Steel Fabricators Inc.; Re S.M.W., Local 562; Re Employee	(Apr.)	601
Robin Hood Multifoods Inc. Glassgoods Division; Re Jean Minor; Re U.F.C.W., Local 175	(Nov.)	1422
Royal Mattress Limited; Re U.F.C.W.....	(Dec.)	1605
Royal Mattress Mfg. Co.; Re U.F.C.W.	(Oct.)	1302
Runnymede Development Corporation Limited; Re C.J.A., Local 27; Re L.I.U.N.A., Local 183	(Oct.)	1305
Runnymede Development Corporation Ltd.; Re I.U.O.E., Local 793	(Nov.)	1423
Sault Ste. Marie Board of Education, The; Re O.S.S.T.F.; Re North York Board of Education; Re Wellington County Board of Education	(Nov.)	1425
Sault Ste. Marie, The Corporation of the City of; Re L.I.U.N.A., Local 1036; Re R.E. Morcan, C.U.P.E.; Re C.J.A., Local 446	(Oct.)	1319
Scarborough, Board of Education for the City of; Re O.P.S.T.F.....	(Jan.)	119
Shaw-Almex Industries Limited; Re U.S.W.A.; Re Group of Employees	(Feb.)	276
Shaw-Almex Industries Limited; Re U.S.W.A.; Re Group of Employees	(July)	1032
Sinclair Welding Ltd.; Re L.I.U.N.A., Local 506; Re I.U.O.E., Local 793; Re B.S.O.I.W., Local 721	(July)	1033
Stacey Electric Company Limited; Re L.I.U.N.A., Local 527; Re I.B.E.W. Construction Council of Ontario and I.B.E.W., Local 586	(Mar.)	428
Steel Company of Canada, Inc.; Re Bonita Clark; Re The Toronto Star, The Hamilton Spectator and The Globe & Mail; Re U.S.W.A., Local 1005	(Jan.)	126
Steen Contractors Limited, L.I.U.N.A., Local 597 and; Re U.A., Local 463; Re Milne and Nicholls/Vanbots Joint Venture.....	(Jan.)	137

Stone & Webster Canada Limited; Re L.I.U.N.A., Local 1036; Re I.U.O.E., Local 793 ... (Apr.)	607
Strathroy Nursing Homes Limited; Re Joan Timothy; Re London and District Service Workers' Union, Local 220, S.E.I.U. (Dec.)	1606
Strongland Construction Ltd.; Re C.J.A., Local 27 (Oct.)	1330
Stucor Construction Ltd.; Re I.U.O.E., Local 793; Re Stewart & Hinan Construction Limited, Stewart & Hinan Contractors Limited, Stucor Construction Ltd., Resource Equipment Limited (Apr.)	614
Superior Ambulance Limited, R.J. Armstrong and Al Erlenbusch; Re O.P.S.E.U. (May)	772
Sutherland and Schultz Limited; Re U.A., Local 463 (Sept.)	1174
Sylvor Limitee, Synco Timber Limited; Re Lumber and Sawmill Workers' Union, Local 2995 of C.J.A.; Re Roger Paquin (Jan.)	128
Taiga Trucking (Ontario) 1980 Inc., et al.; Re I.W.A. (Nov.)	1433
T. Eaton Company Limited; Re R.W.D.S.U.; Re Alex Nigro (Jan.)	166
T. Eaton Company Limited; Re R.W.D.S.U.; Re Val McKean, et al. (Jan.)	141
Thornton Sand & Gravel Limited; Re L.I.U.N.A., Local 1059; Re Group of Employees ... (Oct.)	1331
Toronto Housing Labour Bureau and Bramalea Limited; Re C.J.A., Local 27; Re L.I.U.N.A., Local 183; Re Presidential Group Limited and Presidential Group (Brookshire) Limited .. (Sept.)	1178
Toronto, The Municipality of Metropolitan; Re I.U.O.E., Local 796; Re C.U.P.E., Metropolitan Toronto Civic Employees Union, Local 43 (Feb.)	278
Tremblay, Paul H.; Re O.P.S.E.U.; Re Georgian College of Applied Arts & Technology; Re Attorney General of Ontario..... (Feb.)	284
Trim Trends Canada Limited; Re U.S.W.A. (Apr.)	623
Trimar Construction, L.I.U.N.A., Local 183, Lakeview Estates Ltd., 529126 Ontario Inc. c.o.b. as; Re C.J.A., Local 1190; Re Toronto Housing Labour Bureau..... (Apr.)	632
Umfreville District School Area Board; Re C.U.P.E..... (Mar.)	434
United Canadian Malt Ltd.; Re U.F.C.W., Local 1230 (Sept.)	1188
United Sawmill Limited; Re I.W.A. (Dec.)	1612
VS Services Ltd.; Re Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, Teamsters' Union (June)	931
Walls and Ceilings Contractors Association of Ottawa-Association des Constructeurs de Murs et Plafonds d'Ottawa; Re C.J.A., Local 2041 (Jan.)	174
Walpat Glass & Aluminum Products Ltd. and M & I Aluminum Ltd.; Re P.A.T., Local 1795; Re P.A.T., Local 1819 (July)	1049
Walter Tool and Die Ltd.; Re U.S.W.A. (May)	793
Wellington County Board of Education; Re O.S.S.T.F. (Aug.)	1114
We're Econoprint Fast, 570662 Ontario Limited c.o.b. as; Re St. Catharines Typographical Union No. 416 (Mar.)	440

W.G. Thompson & Sons Limited; Re U.F.C.W.; Re Group of Employees	(May)	787
Whitby, The Town of; Re C.U.P.E.	(June)	937
Wire Rope Industries Ltd.; Re I.W.A.; Re Lumber and Sawmill Workers' Union, Local 2693 of the C.J.A.....	(Oct.)	1336
Wire Rope Industries Ltd.; Re I.W.A.; Re Lumber and Sawmill Workers' Union, Local 2693 of the C.J.A.....	(Dec.)	1613
Workers' Co-operative of Consumers (Fort William) Limited; Re U.F.C.W., Local 409; Re Group of Employees	(Feb.)	297
Xerri, George; Re Local 112 U.A.W. Canada	(Mar.)	444
York-Finch General Hospital; Re O.P.S.E.U. and its Local 565	(Apr.)	641
Zenith Wood Turners Inc. and 148620 Canada Inc.; Re C.J.A., General Workers' Union, Local 1030.....	(Nov.)	1443
Zest Furniture Industries Limited; Re L.I.U.N.A., Local 183; Re Group of Employees	(Feb.)	299

SUBJECT INDEX 1987

- Abandonment – Bargaining Rights – Bargaining unit description in collective agreement making no provision for the exclusion of part-time employees but provisions of collective agreement never applied to part-time employees – Union found to have abandoned its bargaining rights for part-time employees
- YORK-FINCH GENERAL HOSPITAL; RE O.P.S.E.U. AND ITS LOCAL 565... (Apr.) 641
- Abandonment – Bargaining Rights – Construction Industry – Whether union had abandoned its bargaining rights in the ICI sector of the construction industry – Employee bargaining agency continuing to exercise its bargaining rights every two years – Union failing to seek enforcement of the provincial agreement – No abandonment of ICI rights
- LORNE'S ELECTRIC, 291360 ONTARIO LIMITED C.O.B. AS; RE I.B.E.W. LOCALS 586 AND 594 (Nov.) 1405
- Abandonment – Bargaining Rights – Termination – No negotiations taking place between the applicant and the respondent subsequent to the sending of a notice to bargain – No contact at all for one year – Events subsequent to the filing of the termination application of little probative value – Forgetting about unit not a valid explanation for inactivity – Representation vote ordered
- NORRIS TRANSPORT LIMITED; RE TEAMSTERS' UNION, LOCAL 879 (Apr.) 570
- Abandonment – Certification – Collective Agreement – Trade Union Status – Applicant arguing intervener had lost its trade union status by ignoring its constitution for several years – Intervener found to not entirely have abandoned its constitution – Not ceasing to operate as a trade union – Intervener not having abandoned its bargaining rights through inactivity – Foreman not involved in the administration of the union so as to deem agreement not to be a collective agreement – Collective agreement between intervener and respondent constituting a bar to the certification application
- L'ABBE CONSTRUCTION (ONTARIO) LTD.; RE L.I.U.N.A., LOCAL 527; RE CANADIAN CONSTRUCTION, BUILDING MAINTENANCE AND GENERAL WORKERS' UNION (N.C.C.L.) (Oct.) 1191
- Accreditation – Bargaining Rights – Certification – Construction Industry – Applicant union evolving from an industrial into a construction trade union representing construction labourers – Union an affiliated bargaining agent based on established trade union practice but not part of an employee bargaining agency – Whether applicant entitled to represent construction labourers employed by respondent – Board discussing mandatory system of province-wide bargaining in the construction industry
- EKT INDUSTRIES INC.; RE LUMBER AND SAWMILL WORKERS UNION, LOCAL 2693 OF C.J.A.; RE I.U.O.E., LOCAL 793; RE C.J.A., LOCAL 1669; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL, L.I.U.N.A., LOCAL 607; RE TAMARRON GROUP INC.; RE TAMARRON CONSTRUCTION LIMITED (Mar.) 352
- Accreditation – Bargaining Unit – Construction Industry – Accreditation sought for low-rise part of residential sector of the construction industry – Accreditation certificate issued in 1973 for entire residential sector but employers association had never exercised the bargaining rights granted in respect of the low-rise part of the residential sector – Earlier refusal by Board to divide the residential sector into high-rise and low-rise parts – Bargaining rights for low-rise part of sector declared abandoned – Pattern of collective bargaining at time

application made looked at – Bargaining unit described in terms of low-rise part of residential sector appropriate – Accreditation certificate issuing

INDEPENDENT PLUMBING & HEATING CONTRACTORS ASSOCIATION; RE U.A., LOCAL 46; RE METROPOLITAN PLUMBING & HEATING CONTRACTORS' ASSOCIATION (May) 734

Accreditation – Board determining employer bargaining unit in Board Area 15 for residential work performed by Carpenters' Union – Issuing certificate of accreditation to applicant

WALLS AND CEILINGS CONTRACTORS ASSOCIATION OF OTTAWA-ASSOCIATION DES CONSTRUCTEURS DE MURS ET PLAFONDS D'OTTAWA; RE C.J.A., LOCAL 2041.....(Jan.) 174

Accreditation – Reconsideration – Reconsideration sought of 1973 accreditation decision issued by a differently constituted panel of the Board – Bargaining rights in respect of low-rise part of residential sector never exercised – Board excluding low-rise part of residential sector from accreditation certificate – Low-rise part of residential sector defined

METROPOLITAN PLUMBING AND HEATING CONTRACTORS ASSOCIATION; RE U.A., LOCAL 46 (RESIDENTIAL DIVISION); RE TORONTO HOME BUILDERS' ASSOCIATION..... (May) 745

Adjournment – Collective Agreement – Construction Industry Grievance – Evidence – Applicant's failure to file collective agreement with its referral not grounds for granting respondent an adjournment – Board entertaining applicant's evidence about what respondent said in prior s. 1(4) proceedings – Onus of proof on applicant but evidentiary burden shifting to respondent – Respondent calling no witnesses – Grievance allowed

BROOME, TERENCE; RE C.J.A., LOCAL 1316.....(Jan.) 13

Adjournment – Construction Industry Grievance – Practice and Procedure – No one appearing at hearing on behalf of respondent and matter proceeding – Board's attention drawn day after hearing to telex received morning of hearing from respondent stating he would like the hearing re-scheduled – Board's practice on adjournments reviewed – Adjournment would not have been granted on the basis of the telex message in any event – Non-union hire contrary to collective agreement – Compensation awarded

CATALYST TECHNOLOGY (CANADA) LTD.; RE B.B.F., LODGE 128..... (June) 803

Arbitration – Duty of Fair Representation – Practice and Procedure – Remedies – Unfair Labour Practice – Direction to arbitration inappropriate remedy for union's breach of fair representation duty when dispute between union and complainant – Board hearing merits of grievance – Rules applicable to court proceedings used to calculate interest on lost wages – Costs denied

LECUYER, GERALD, ET AL.; RE C.P.U., LOCAL 132 AND C.P.U.; RE ABITIBI-PRICE INC. (Apr.) 529

Bargaining Rights – Abandonment – Bargaining unit description in collective agreement making no provision for the exclusion of part-time employees but provisions of collective agreement never applied to part-time employees – Union found to have abandoned its bargaining rights for part-time employees

YORK-FINCH GENERAL HOSPITAL; RE O.P.S.E.U. AND ITS LOCAL 565... (Apr.) 641

Bargaining Rights – Abandonment – Construction Industry – Whether union had abandoned its bargaining rights in the ICI sector of the construction industry – Employee bargaining

agency continuing to exercise its bargaining rights every two years – Union failing to seek enforcement of the provincial agreement – No abandonment of ICI rights

LORNE'S ELECTRIC, 291360 ONTARIO LIMITED C.O.B. AS; RE I.B.E.W.,
LOCALS 586 AND 594(Nov.) 1405

Bargaining Rights – Abandonment – Termination – No negotiations taking place between the applicant and the respondent subsequent to the sending of a notice to bargain – No contact at all for one year – Events subsequent to the filing of the termination application of little probative value – Forgetting about unit not a valid explanation for inactivity – Representation vote ordered

NORRIS TRANSPORT LIMITED; RE TEAMSTERS' UNION, LOCAL 879(Apr.) 570

Bargaining Rights – Accreditation – Certification – Construction Industry – Applicant union evolving from an industrial into a construction trade union representing construction labourers – Union an affiliated bargaining agent based on established trade union practice but not part of an employee bargaining agency – Whether applicant entitled to represent construction labourers employed by respondent – Board discussing mandatory system of province-wide bargaining in the construction industry

EKT INDUSTRIES INC.; RE LUMBER AND SAWMILL WORKERS UNION,
LOCAL 2693 OF C.J.A.; RE I.U.O.E., LOCAL 793; RE C.J.A., LOCAL 1669; RE
L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL, L.I.U.N.A., LOCAL
607; RE TAMARRON GROUP INC.; RE TAMARRON CONSTRUCTION
LIMITED.....(Mar.) 352

Bargaining Rights – Bargaining Unit – Certification – Construction Industry – Respondent asserting that the bargaining unit proposed by the applicant would encompass employees covered by a collective agreement it has with MTABA – Intervener claiming it represents all non-ICI construction labourers who are employed in accordance with the MTABA agreement – Board finding bargaining rights of intervener not encompassing all of the non-ICI sectors of the construction industry – Not necessary to apply MTABA agreement to dispose of the application – Bargaining unit described as excluding persons covered by subsisting agreements

MENKES DEVELOPMENTS INC.; RE L.I.U.N.A., LOCAL 506; RE L.I.U.N.A.,
LOCAL 183(June) 881

Bargaining Rights – Certification – Construction Industry – On date applications filed, none of the respondents had any employees in any of the bargaining units applied for in any of the applications – Applicant already held bargaining rights for all of the employees for whom it sought to be certified – Board explaining construction industry certification applications – Application for certification not an appropriate vehicle for obtaining clarification of what bargaining rights the applicant already holds for which employers pursuant to the EPSCA and ICI provincial agreements – Applications dismissed

BROWN BOVERI HOWDEN INC.; RE U.A.; RE E.P.S.C.A.; RE M.C.A.O.; RE
NICHOLLS RADTKE LTD.; RE STATE CONTRACTORS INC.; RE WATTS & HENDERSON LTD.....(Mar.) 316

Bargaining Rights – Certification – Construction Industry – Parties – Practice and Procedure – Employer seeking to resile from agreement on employee list and revert to earlier position – Inappropriate for Board to permit employer to resile – Labourers' Union seeking to intervene in carpenters application on the basis that it represented all construction employees of the employer pursuant to a collective agreement between it and the Housing Labour Bureau – Labourers' Union denied intervener status on basis of collective agreement which

does not cover carpenters – Labourers' Union granted status to intervene based on membership evidence submitted on date of hearing – Labour relations officer appointed

RUNNYMEDE DEVELOPMENT CORPORATION LIMITED; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183..... (Oct.)

1305

Bargaining Rights – Certification – Construction Industry – Reconsideration – Board certifying applicant for ICI sector without a hearing based on its implied assertion that it was not an affiliated bargaining agent – Board later determining that applicant was an affiliated bargaining agent and could not represent ICI sector employees – Whether Board should revoke or amend prior certificate – Certificate revoked

RICHARD D. STEELE CONSTRUCTION (1979) LTD.; RE C.J.A., LOCAL 1030..... (Aug.)

1110

Bargaining Rights – Certification – Pre-Hearing Vote – Applicant requesting pre-hearing vote – Applicant and respondent have been parties to “agreements” which speak to terms of employment – If applicant already has bargaining rights for employees in unit for which it seeks certification, no outcome of a vote would change those rights – Hearing scheduled so that applicant can show cause why its request for a vote should not be refused

ONTARIO HYDRO; RE THE SOCIETY OF ONTARIO HYDRO PROFESSIONAL AND ADMINISTRATIVE EMPLOYEES; RE C.U.P.E.-C.L.C. ONTARIO HYDRO EMPLOYEES UNION, LOCAL 1000; RE GROUPS OF EMPLOYEES..... (Mar.)

419

Bargaining Rights – Collective Agreement – Construction Industry – Prior Board decision concerning different parties holding that Union could not represent construction labourers in the ICI sector of the construction industry – Applicant seeking declaration that collective agreement with Union unlawful – Analysis of principles of *re judicata* and *in rem* – Prior Board decision is a decision *in rem* – Collective agreement between applicant and Union declared null and void

CONSTRUCTION ASSOCIATION OF THUNDER BAY INC., GENERAL CONTRACTORS' DIVISION OF THE; RE LUMBER AND SAWMILL WORKERS' UNION, LOCAL 2693 OF C.J.A. AND L.I.U.N.A., LOCAL 607, AND L.I.U.N.A. ONTARIO PROVINCIAL DISTRICT COUNCIL; RE ONTARIO PROVINCIAL COUNCIL, C.J.A. (July)

976

Bargaining Rights – Collective Agreement – Construction Industry – Related Employer – Sale of a Business – Respondent requesting that application be dismissed on the basis that no valid collective bargaining rights had ever been obtained by the applicant because the collective agreement was signed when there were no employees in the unit – *Nicholls-Radtke* distinguished – Employer had no present or future need for employees when collective agreement signed – No valid collective agreement – Sale and related employer issues academic – Application dismissed

EIGHTY-FIVE ELECTRIC, RAYMOND BRISSON C.O.B. AS, AND RICHARD TOMINSKI C.O.B. AS R.T. ELECTRIC; RE I.B.E.W., LOCAL 1687..... (June)

833

Bargaining Rights – Construction Industry – Reconsideration – Effect of earlier decision to call into question applicant's bargaining relationships with several employers – Stay requested pending full reconsideration and application to Minister for designation – No legal requirement that power of reconsideration be exercised by the panel making the original decision but no grounds here to reconsider, vary, revoke or stay the original decision

EKT INDUSTRIES INC.; RE LUMBER AND SAWMILL WORKERS UNION, LOCAL 2693 OF THE C.J.A.; RE I.U.O.E., LOCAL 793; RE C.J.A., LOCAL 1669; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL AND L.I.U.N.A., LOCAL 607; RE EKT INDUSTRIES INC., TAMARRON GROUP INC., TAMARRON CONSTRUCTION LIMITED (May)

696

Bargaining Rights – Evidence – Related Employer – Non-unionized company bought by unionized company – Board relying on extrinsic evidence of past practice to determine contours of applicant's existing bargaining rights – Board exercising discretion to issue one employer declaration and declaration that non-unionized company bound by the collective agreement between the applicant and the unionized company

MASSTRON SCALE LTD. AND TOLEDO SCALE DIVISION OF RELIANCE ELECTRIC LIMITED; RE I.A.M. (Dec.) 1578

Bargaining Unit – Accreditation – Construction Industry – Accreditation sought for low-rise part of residential sector of the construction industry – Accreditation certificate issued in 1973 for entire residential sector but employers association had never exercised the bargaining rights granted in respect of the low-rise part of the residential sector – Earlier refusal by Board to divide the residential sector into high-rise and low-rise parts – Bargaining rights for low-rise part of sector declared abandoned – Pattern of collective bargaining at time application made looked at – Bargaining unit described in terms of low-rise part of residential sector appropriate – Accreditation certificate issuing

INDEPENDENT PLUMBING & HEATING CONTRACTORS ASSOCIATION; RE U.A., LOCAL 46; RE METROPOLITAN PLUMBING & HEATING CONTRACTORS' ASSOCIATION (May) 734

Bargaining Unit – Bargaining Rights – Certification – Construction Industry – Respondent asserting that the bargaining unit proposed by the applicant would encompass employees covered by a collective agreement it has with MTABA – Intervener claiming it represents all non-ICI construction labourers who are employed in accordance with the MTABA agreement – Board finding bargaining rights of intervener not encompassing all of the non-ICI sectors of the construction industry – Not necessary to apply MTABA agreement to dispose of the application – Bargaining unit described as excluding persons covered by subsisting agreements

MENKES DEVELOPMENTS INC.; RE L.I.U.N.A., LOCAL 506; RE L.I.U.N.A., LOCAL 183 (June) 881

Bargaining Unit – Certification – Applicant challenging the inclusion of three employees in the unit – Employees on the list of employees who were at work in the bargaining unit in another application on the application date – Employee can only be in one bargaining unit at the time the application is made – Board finding implicit agreement that employees in other unit since no one challenged their inclusion on that list

HARDEN & KING CONSTRUCTION LTD.; RE I.U.O.E., LOCAL 793; RE GROUP OF EMPLOYEES (Dec.) 1510

Bargaining Unit – Certification – Applicant requesting a clarity note that the exclusion of technical staff in the bargaining unit description means only the two classifications in the technical group at the time of application – Board discussing its use of clarity notes – Clarity note not appropriate here

CAN-ENG METAL TREATING LTD.; RE C.A.W.; RE GROUP OF EMPLOYEES (Mar.) 340

Bargaining Unit – Certification – Applicant seeking virtual province-wide unit of editorial employees employed at community newspapers operated by respondent – No dispute that departmental-wide unit appropriate – Board sensitive to pattern of distribution and level of employee support – Most comprehensive unit appropriate – Geographic scope of unit covering numerous municipalities

HARLEQUIN ENTERPRISES LIMITED; RE THE SOUTHERN ONTARIO NEWSPAPER GUILD, LOCAL 87, NEWSPAPER GUILD (Feb.) 226

Bargaining Unit – Certification – Appropriate bargaining unit consisting of all occasional teachers on the elementary school panel – Secondary occasionals who filled in for primary school teachers during professional conference not considered employees for the purpose of the count

SCARBOROUGH, BOARD OF EDUCATION FOR THE CITY OF;
RE O.P.S.T.F. (Jan.) 119

Bargaining Unit – Certification – Appropriate to place secondary panel occasional teachers in a separate bargaining unit from elementary panel occasional teachers – Degree of interchange between the two panels and fragmentation of workforce factors to be considered – Certificate issuing

PEEL BOARD OF EDUCATION, THE; RE O.S.S.T.F. (Dec.) 1600

Bargaining Unit – Certification – Collective Agreement – Respondent asserting that occasional teachers already covered by subsisting collective agreement covering Bill 100 teachers – Certain terms and conditions of employment relating to occasional teachers included in personnel manual incorporated into collective agreement – Manual cannot constitute a collective agreement for occasional teachers as a result of voluntary recognition – Certificate issuing

LONDON, BOARD OF EDUCATION FOR THE CITY OF; RE O.P.S.T.F.; RE F.W.T.A.O. (Feb.) 235

Bargaining Unit – Certification – Collective Agreement – Timeliness – Whether collective agreement in existence so as to render certification application untimely – Incumbent union having given timely notice to bargain – Collective agreement expiring – Certification application timely – Only one employee in office unit – Board departing from practice of separating office and plant units

WIRE ROPE INDUSTRIES LTD.; RE I.W.A.; RE LUMBER AND SAWMILL WORKERS' UNION, LOCAL 2693 OF THE C.J.A. (Dec.) 1613

Bargaining Unit – Certification – Construction Industry – Applicant seeking to represent construction labourers of the employer – Applicant requesting clarity note that employees engaged in survey work included in unit – Applicant having a history of representing employees of surveying companies that do not operate as employers in the construction industry – Intervener having a history of acquiring bargaining rights under the construction industry provisions for employees engaged as surveyors and designated to represent surveyors in the I.C.I. sector – Application dismissed – No one on employee list who was a construction labourer who had engaged in survey work and surveying not included in applicant's designation order

STONE & WEBSTER CANADA LIMITED; RE L.I.U.N.A., LOCAL 1036; RE I.U.O.E., LOCAL 793 (Apr.) 607

Bargaining Unit – Certification – Construction Industry – Board reviewing its criteria in determining whether an employee is in the bargaining unit for the purpose of the count – Board suggesting use of a representative period be eliminated

E & E SEEGLER LIMITED; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL; RE GROUP OF EMPLOYEES (Jan.) 41

Bargaining Unit – Certification – Construction Industry – Construction industry employer and construction industry employees – Trade union not a construction industry trade union – Whether bargaining unit should be described in terms of "all employees" rather than by reference to the trades or crafts that were at work on the date application made – Danger of

fragmentation and disruption if unit limited by trade – All employee unit appropriate – Certificate issuing

PICKERING WELDING & STEEL SUPPLY, KENOYD LIMITED TRADING AS; RE U.S.W.A. (June) 923

Bargaining Unit – Certification – Construction Industry – Labourers' Union requesting an "all employee" unit for persons engaged in the erection and finishing of precast concrete products in the ICI sector – Respondent and intervenors requesting that unit be described in terms of "all construction labourers" – Employee bargaining agency designation order referring to "all employees" – Board concluding that the question of the description of a bargaining unit and the wording of the designation are not co-extensive – Board must be sensitive to jurisdictional disputes – Board generally avoiding an all employee unit in the construction industry – Competing jurisdictional claims by intervenors involved in this application – Unit confined to construction labourers

SINCLAIR WELDING LTD.; RE L.I.U.N.A., LOCAL 506; RE I.U.O.E., LOCAL 793; RE B.S.O.I.W., LOCAL 721 (July) 1033

Bargaining Unit – Certification – Construction Industry – Representation Vote – Whether appropriate to include steamfitters in plumbers unit when separate certified trades and employer not employing any steamfitters – Standard unit including steamfitters granted – Irrelevant whether there are employees in all the classifications used to describe that standard unit – Board exercising its discretion to order a representation vote because of improper union conduct

D.E. WITMER PLUMBING AND HEATING LIMITED; RE U.A., LOCAL 527; RE GROUP OF EMPLOYEES; RE BILL HENNINK AND BILL BONVANIE (Oct.) 1228

Bargaining Unit – Certification – Construction Industry – Test to determine whether employee performing bargaining unit work – Departure from representative period test limiting line of questioning – Employee not spending the majority of his time doing bargaining unit work on application date – Unnecessary to consider any other factor – Application dismissed

DELCO CONTRACTORS, 608322 ONTARIO INC.; RE C.J.A., LOCAL 494 (June) 830

Bargaining Unit – Certification – Construction Industry – Whether any of the respondent's employees employed in the unit on the application date – Respondent's argument that the work of operating the hoists on the project was not the work of the applicant's craft and therefore the performance of it would not have brought any of the respondent's employees within the scope of the unit, rejected – Person hired in violation of the intervener's agreement with the MTABA can be considered an employee of the respondent in a unit other than the one covered by that agreement – Certificates issuing

H & D CONSTRUCTION, MANCHENEEL INVESTMENTS LIMITED C.O.B. AS, AND MIHU HOLDINGS LIMITED; RE I.U.O.E., LOCAL 793; RE L.I.U.N.A., LOCAL 183 (Dec.) 1495

Bargaining Unit – Certification – Construction Industry – Whether drywall tapers employees or independent contractors – Board reviewing its criteria in determining whether an employee is in the bargaining unit for the purpose of the count – Board suggesting use of a "representative period" be eliminated

GILVESY ENTERPRISES INC.; RE P.A.T., LOCAL 1891 (Feb.) 220

Bargaining Unit – Certification – Construction Industry – Whether persons employed to clean up scrap material in apartment building performing work of construction labourers – Clean up of scrap material that at one time may have been left over from construction work and

- clean up not done with reference to any specific renovation work not the work of construction labourers – Persons excluded from unit – Certificates issuing
- MING SUN HOLDINGS INC.; RE L.I.U.N.A., LOCAL 506 (Dec.) 1585
- Bargaining Unit – Certification – Craft unit of stationary engineers ceasing to exist when employees absorbed into broader CUPE bargaining unit – IUOE seeking to carve out historical craft unit of stationary engineers formerly represented by CUOE – Carve out not permitted – Application dismissed
- TORONTO, THE MUNICIPALITY OF METROPOLITAN; RE I.U.O.E., LOCAL 796; RE C.U.P.E., METROPOLITAN TORONTO CIVIC EMPLOYEES UNION, LOCAL 43..... (Feb.) 278
- Bargaining Unit – Certification – Dependent Contractor – Related Employer – Union seeking to represent a unit of taxicab drivers and “owner-operators” working “under the banner” of the respondent Yellow Cab – Single car/plate owner-operators found to be dependent contractors – No affirmative evidence that owner-operator/dependent contractors wish to be included in the same unit as the helper-drivers – Two units found to be appropriate, one of dependent contractors and one of drivers – Insufficient evidence that other named respondents are related employers – Matter remitted back to labour relations officer
- HAMILTON YELLOW CAB COMPANY LIMITED; RE R.W.D.S.U. (Nov.) 1373
- Bargaining Unit – Certification – Employer operating two plants within same municipality – Union organizing only one plant – Whether separate bargaining units appropriate – Substantial community of interest among employees at both plants – Single plant unit not appropriate – Application dismissed
- MOBIL CHEMICAL CANADA, LTD.; RE E.C.W.U. (Apr.) 559
- Bargaining Unit – Certification – Evidence – Officer conducting inquiry into duties and responsibilities of “Area Superintendents” – Union denied opportunity to call evidence on duties and responsibilities of employees engaged as “Interpreters” – Board finding that such evidence not within the scope of the officer’s inquiry but arguable whether evidence respecting borderline positions can have any relevance in a determination under s. 1(3)(b) – Issue should not be the subject of a hearing until officer’s inquiry completed
- GRAND RIVER CONSERVATION AUTHORITY; RE O.P.S.E.U. (Nov.) 1371
- Bargaining Unit – Certification – Parties agreeing on bargaining unit description that differed from the standard “office, clerical and technical” description – Board reviewing its role in determining the appropriate bargaining unit when the parties have agreed to a bargaining unit description which departs from the Board’s usual practice – Board accepting proposed unit
- HALEY INDUSTRIES LIMITED; RE U.S.W.A.; RE GROUP OF EMPLOYEES..... (Mar.) 373
- Bargaining Unit – Certification – Persons employed under a co-operative or governmental training program included in bargaining units – *Elizabeth Fry Society of Ottawa* distinguished
- GREY COUNTY HOMES FOR THE AGED, THE CORPORATION OF THE COUNTY OF GREY OPERATING AS; RE LONDON AND DISTRICT SERVICE WORKERS’ UNION, LOCAL 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Apr.) 508
- Bargaining Unit – Certification – Practice and Procedure – Employer alleging that one-third of employees should be excluded from bargaining unit by operation of s. 1(3)(b) – Exclusions sought by employer appearing to be at variance with Board jurisprudence – Examination

process for large group of employees time consuming and expensive – Employer directed to file statement elaborating on job functions which would warrant a s.1(3)(b) exclusion

CATERPILLAR OF CANADA LTD.; RE C.A.W.; RE GROUP OF EMPLOYEES (Feb.) 192

Bargaining Unit – Certification – Practice and Procedure – Whether Administration Officers and Assistant Branch Managers of trust company exercise managerial functions – Administration Officer Trainees excluded from unit on community of interest grounds – Original panel of Board not seized with remaining issues – Board reviewing its policy concerning the jurisdiction of any panel to consider outstanding issues in certification applications

NATIONAL TRUST; RE UNION OF BANK EMPLOYEES (ONTARIO), LOCAL 2104, C.L.C.; RE GROUP OF EMPLOYEES (Jan.) 108

Bargaining Unit – Certification – Pre-Hearing Vote – Panel not adopting the bargaining unit description agreed to by the applicant and respondent as the voting constituency – Use of the phrase “save and except persons in bargaining units for which any trade union held bargaining rights as of . . .” inappropriate – Incumbent had not agreed to this bargaining unit description which deviates from that in the incumbent’s collective agreement – Incumbent’s bargaining unit description adopted minus language referring to employees of contractors engaged by the respondent – Vote ordered

LECOURS LUMBER COMPANY LIMITED; RE I.W.A. (Oct.) 1286

Bargaining Unit – Certification – Pre-Hearing Vote – Parties not in agreement on the description of the appropriate bargaining unit before the vote was conducted – No one requesting a hearing after vote – Board disposing of application on the material before it without conducting a hearing – Board adopting description of voting constituency as the appropriate bargaining unit

UNITED SAWMILL LIMITED; RE I.W.A. (Dec.) 1612

Bargaining Unit – Certification – Pre-Hearing Vote – Problems with identifying employees in the voting constituency in applications involving occasional teachers – When application of *York* test places teacher in more than one unit, teacher falls in unit to which s/he has the greatest attachment – Voting arrangements made for occasional teachers – Earlier application for certification of educational assistants to be considered with this application after vote

HAMILTON, THE BOARD OF EDUCATION FOR THE CITY OF; RE O.P.S.T.F.; RE O.S.S.T.F. (June) 847

Bargaining Unit – Certification – Pre-Hearing Vote – *School Boards and Teachers Collective Negotiations Act* – “Bill 100 teacher” and “occasional teacher” not always mutually exclusive categories – Board determining appropriate exclusionary language for occasional teacher bargaining unit – Board declining to set aside vote on basis of inadequate notice of vote, inadequate information on the benefits of collective bargaining or low voter turnout – Certificates issuing

SAULT STE. MARIE BOARD OF EDUCATION, THE; RE O.S.S.T.F.; RE NORTH YORK BOARD OF EDUCATION; RE WELLINGTON COUNTY BOARD OF EDUCATION (Nov.) 1425

Bargaining Unit – Certification – Representation Vote – Voter eligibility language interpreted – Whether employee promoted out of bargaining unit between date vote ordered and vote held – Officer ordered to inquire into duties and responsibilities of person in dispute as of vote date

HERBIE’S DRUG WAREHOUSE LIMITED; RE U.S.W.A.; RE GROUP OF EMPLOYEES (Nov.) 1393

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- PORCUPINE GENERAL HOSPITAL; RE O.N.A.; RE GROUP OF EMPLOYEES (Mar.) 423
- Bargaining Unit – Certification – Union seeking bargaining unit comprising the computer information services department of a newspaper – Unit one of the few departments remaining unorganized – Where there has been a history of fragmentation the Board may consider a departmental unit to be appropriate – Sufficient community of interest and no serious labour relations difficulties would result if unit found appropriate – Tag-end unit not yet necessary – Departmental unit found appropriate
- OTTAWA CITIZEN, THE, A DIVISION OF SOUTHAM INC.; RE ONTARIO NEWS-PAPER GUILD, LOCAL 205 (Aug.) 1098
- Bargaining Unit – Certification Where Act Contravened – Unfair Labour Practice – Geographic scope of bargaining units in lumber industry – Comments in letter from employer to employees contravening ss. 64 and 70 – Employees still able to freely express choice in representation vote – Vote ordered
- SYLVOR LIMITEE, SYNCO TIMBER LIMITED; RE LUMBER AND SAWMILL WORKERS’ UNION, LOCAL 2995 OF C.J.A.; RE ROGER PAQUIN (Jan.) 128
- Bargaining Unit – Certification – Whether Board should grant a municipal-wide unit in the context of a non-vending food service operation – Prevailing pattern in industry of collective agreements with client-specific scope clauses – Bargaining unit described by reference to client’s name
- VS SERVICES LTD.; RE MILK AND BREAD DRIVERS, DAIRY EMPLOYEES, CATERERS AND ALLIED EMPLOYEES, LOCAL UNION NO. 647, TEAMSTERS’ UNION (June) 931
- Bargaining Unit – Certification – Whether graduate and registered nurses should be excluded from an all employee nursing home service unit on basis of community of interest or past practice – Board not prepared to conclude that past practice in hospital sector should be applied to nursing home sector – Past practice in nursing home sector ambiguous – Respondent making no submissions with respect to community of interest factors – Board determining that all employee unit viable
- KING NURSING HOME LTD.; RE C.L.A.C. (Oct.) 1257
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- KESWICK I.G.A., H.W. GLUCK C.O.B. AS; RE U.F.C.W. LOCAL 633; RE GROUP OF EMPLOYEES (Nov.) 1395
- Bargaining Unit – Certification – Whether pages should be excluded from a unit composed of part-time employees and students employed during the school vacation period in the city’s library system – Pages are part-time students regularly employed during the school term for not more than 24 hours per week – On community of interest grounds pages included in unit – Certification application dismissed
- MISSISSAUGA PUBLIC LIBRARY BOARD; RE C.P.U. (Apr.) 554

Bargaining Unit – Certification – Whether supply instructors should be put in same bargaining unit as occasional teachers – Unit consisting solely of occasional teachers appropriate

CARLETON ROMAN CATHOLIC SEPARATE SCHOOL BOARD; RE ONTARIO CATHOLIC OCCASIONAL TEACHERS' ASSOCIATION (Jan.) 18

Bargaining Unit – Construction Industry – Respondent asserting that applicant must, if it seeks I.C.I. sector bargaining rights, also apply for non-I.C.I. bargaining rights in relation to all Board areas in which the respondent has construction labourers in its employ – Board rejecting argument that applicant required to make its application with respect to more than one geographic area

DAGMAR CONSTRUCTION LIMITED; RE L.I.U.N.A. (Apr.) 480

Bargaining Unit – Crown Transfer – Representation Vote – Board declaring KBM to be a successor employer and determining appropriate bargaining unit – Board declining to exercise its discretion to order a representation vote of the employees in the unit because no intermingling of employees and only one union involved

KBM FORESTRY CONSULTANTS INC., THE CROWN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTRY OF NATURAL RESOURCES AND; RE O.P.S.E.U. (July) 1007

Bargaining Unit – Termination – Challenge to list of employees filed by the employer on the basis that the three individuals in question could not have performed any bargaining unit work but for the employer's violation of the collective agreement – Three individuals not having status as bargaining unit employees and therefore not properly on the employee list – Application dismissed

CORECON CONSTRUCTION LIMITED; RE C.J.A., LOCAL 27; RE EMPLOYEES OF CORECON CONSTRUCTION (Dec.) 1480

Build-Up – Certification – Representation Vote – Terminal date extended following change in bargaining unit description – Application made during pea-picking season – Work force expected to expand during corn season – Whether representation vote should be ordered – Employees on the application date “representative” of the employer's employment environment – Vote unnecessary – Certificate issuing

COBI FOODS INC.; RE U.F.C.W. (June) 815

Certification – Abandonment – Collective Agreement – Trade Union Status – Applicant arguing intervener had lost its trade union status by ignoring its constitution for several years – Intervener found to not entirely have abandoned its constitution – Not ceasing to operate as a trade union – Intervener not having abandoned its bargaining rights through inactivity – Foreman not involved in the administration of the union so as to deem agreement not to be a collective agreement – Collective agreement between intervener and respondent constituting a bar to the certification application

L'ABBE CONSTRUCTION (ONTARIO) LTD.; RE L.I.U.N.A., LOCAL 527; RE CANADIAN CONSTRUCTION, BUILDING MAINTENANCE AND GENERAL WORKERS' UNION (N.C.C.L.) (Oct.) 1191

Certification – Accreditation – Bargaining Rights – Construction Industry – Application union evolving from an industrial into a construction trade union representing construction labourers – Union an affiliated bargaining agent based on established trade union practice but not part of an employee bargaining agency – Whether applicant entitled to represent con-

struction labourers employed by respondent – Board discussing mandatory system of province-wide bargaining in the construction industry

EKT INDUSTRIES INC.; RE LUMBER AND SAWMILL WORKERS UNION, LOCAL 2693 OF C.J.A.; RE I.U.O.E., LOCAL 793; RE C.J.A., LOCAL 1669; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL, L.I.U.N.A., LOCAL 607; RE TAMARRON GROUP INC.; RE TAMARRON CONSTRUCTION LIMITED.....(Mar.)

352

Certification – Bargaining Rights – Bargaining Unit – Construction Industry – Respondent asserting that the bargaining unit proposed by the applicant would encompass employees covered by a collective agreement it has with MTABA – Intervener claiming it represents all non-ICI construction labourers who are employed in accordance with the MTABA agreement – Board finding bargaining rights of intervener not encompassing all of the non-ICI sectors of the construction industry – Not necessary to apply MTABA agreement to dispose of the application – Bargaining unit described as excluding persons covered by subsisting agreements

MENKES DEVELOPMENTS INC.; RE L.I.U.N.A., LOCAL 506; RE L.I.U.N.A., LOCAL 183 (June)

881

Certification – Bargaining Rights – Construction Industry – On date applications filed, none of the respondents had any employees in any of the bargaining units applied for in any of the applications – Applicant already held bargaining rights for all of the employees for whom it sought to be certified – Board explaining construction industry certification applications – Application for certification not an appropriate vehicle for obtaining clarification of what bargaining rights the applicant already holds for which employers pursuant to the EPSCA and ICI provincial agreements – Application dismissed

BROWN BOVERI HOWDEN INC.; RE U.A.; RE E.P.S.C.A.; RE M.C.A.O.; RE NICHOLLS RADTKE LTD.; RE STATE CONTRACTORS INC.; RE WATTS & HENDERSON LTD.....(Mar.)

316

Certification – Bargaining Rights – Construction Industry – Parties – Practice and Procedure – Employer seeking to resile from agreement on employee list and revert to earlier position – Inappropriate for Board to permit employer to resile – Labourers' Union seeking to intervene in carpenters application on the basis that it represented all construction employees of the employer pursuant to a collective agreement between it and the Housing Labour Bureau – Labourers' Union denied intervener status on basis of collective agreement which does not cover carpenters – Labourers' Union granted status to intervene based on membership evidence submitted on date of hearing – Labour relations officer appointed

RUNNYMEDE DEVELOPMENT CORPORATION LIMITED; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183..... (Oct.)

1305

Certification – Bargaining Rights – Construction Industry – Reconsideration – Board certifying applicant for ICI sector without a hearing based on its implied assertion that it was not an affiliated bargaining agent – Board later determining that applicant was an affiliated bargaining agent and could not represent ICI sector employees – Whether Board should revoke or amend prior certificate – Certificate revoked

RICHARD D. STEELE CONSTRUCTION (1979) LTD.; RE C.J.A., LOCAL 1030.....(Aug.)

1110

Certification – Bargaining Rights – Pre-Hearing Vote – Applicant requesting pre-hearing vote – Applicant and respondent have been parties to “agreements” which speak to terms of employment – If applicant already has bargaining rights for employees in unit for which it

seeks certification, no outcome of a vote would change those rights – Hearing scheduled so that applicant can show cause why its request for a vote should not be refused

ONTARIO HYDRO; RE THE SOCIETY OF ONTARIO HYDRO PROFESSIONAL AND ADMINISTRATIVE EMPLOYEES; RE C.U.P.E.-C.L.C. ONTARIO HYDRO EMPLOYEES UNION, LOCAL 1000; RE GROUPS OF EMPLOYEES.....(Mar.) 419

Certification – Bargaining Unit – Applicant challenging the inclusion of three employees in the unit – Employees on the list of employees who were at work in the bargaining unit in another application on the application date – Employee can only be in one bargaining unit at the time the application is made – Board finding implicit agreement that employees in other unit since no one challenged their inclusion on that list

HARNDEN & KING CONSTRUCTION LTD.; RE I.U.O.E. LOCAL 793; RE GROUP OF EMPLOYEES.....(Dec.) 1510

Certification – Bargaining Unit – Applicant requesting a clarity note that the exclusion of technical staff in the bargaining unit description means only the two classifications in the technical group at the time of application – Board discussing its use of clarity notes – Clarity note not appropriate here

CAN-ENG METAL TREATING LTD.; RE C.A.W.; RE GROUP OF EMPLOYEES.....(Mar.) 340

Certification – Bargaining Unit – Applicant seeking virtual province-wide unit of editorial employees employed at community newspapers operated by respondent – No dispute that departmental-wide unit appropriate – Board sensitive to pattern of distribution and level of employee support – Most comprehensive unit appropriate – Geographic scope of unit covering numerous municipalities

HARLEQUIN ENTERPRISES LIMITED; RE THE SOUTHERN ONTARIO NEWSPAPER GUILD, LOCAL 87, NEWSPAPER GUILD.....(Feb.) 226

Certification – Bargaining Unit – Appropriate bargaining unit consisting of all occasional teachers on elementary school panel – Secondary occasionals who filled in for primary school teachers during professional conference not considered employees for the purpose of the count

SCARBOROUGH, BOARD OF EDUCATION FOR THE CITY OF; RE O.P.S.T.F.(Jan.) 119

Certification – Bargaining Unit – Appropriate to place secondary panel occasional teachers in a separate bargaining unit from elementary panel occasional teachers – Degree of interchange between the two panels and fragmentation of workforce factors to be considered – Certificate issuing

PEEL BOARD OF EDUCATION, THE; RE O.S.S.T.F.....(Dec.) 1600

Certification – Bargaining Unit – Collective Agreement – Respondent asserting that occasional teachers already covered by subsisting collective agreement covering Bill 100 teachers – Certain terms and conditions of employment relating to occasional teachers included in personnel manual incorporated into collective agreement – Manual cannot constitute a collective agreement for occasional teachers as a result of voluntary recognition – Certificate issuing

LONDON, BOARD OF EDUCATION FOR THE CITY OF; RE O.P.S.T.F.; RE F.W.T.A.O.....(Feb.) 235

Certification – Bargaining Unit – Collective Agreement – Timeliness – Whether collective agreement in existence so as to render certification application untimely – Incumbent union having given timely notice to bargain – Collective agreement expiring – Certification applica-

tion timely – Only one employee in office unit – Board departing from practice of separating office and plant units

WIRE ROPE INDUSTRIES LTD.; RE I.W.A.; RE LUMBER AND SAWMILL WORKERS' UNION, LOCAL 2693 OF THE C.J.A. (Dec.)

1613

Certification – Bargaining Unit – Construction Industry – Applicant seeking to represent construction labourers of the employer – Applicant requesting clarity note that employees engaged in survey work included in unit – Applicant having a history of representing employees of surveying companies that do not operate as employers in the construction industry – Intervener having a history of acquiring bargaining rights under the construction industry provisions for employees engaged as surveyors and designated to represent surveyors in the I.C.I. sector – Application dismissed – No one on employee list who was a construction labourer who had engaged in survey work and surveying not included in applicant's designation order

STONE & WEBSTER CANADA LIMITED; RE L.I.U.N.A., LOCAL 1036; RE I.U.O.E., LOCAL 793 (Apr.)

607

Certification – Bargaining Unit – Construction Industry – Board reviewing its criteria in determining whether an employee is in the bargaining unit for the purpose of the count – Board suggesting use of a representative period be eliminated

E & E SEEGMILLER LIMITED; RE L.I.U.N.A., LOCAL 493; RE I.U.O.E., LOCAL 793 (Jan.)

41

Certification – Bargaining Unit – Construction Industry – Construction industry employer and construction industry employees – Trade union not a construction industry trade union – Whether bargaining unit should be described in terms of “all employees” rather than by reference to the trades or crafts that were at work on the date application made – Danger of fragmentation and disruption if unit limited by trade – All employee unit appropriate – Certificate issuing

PICKERING WELDING & STEEL SUPPLY, KENOYD LIMITED TRADING AS; RE U.S.W.A. (June)

923

Certification – Bargaining Unit – Construction Industry – Labourers' Union requesting “all employee” unit for persons engaged in the erection and finishing of precast concrete products in the ICI sector – Respondent and intervenors requesting that unit be described in terms of “all construction labourers” – Employee bargaining agency designation order referring to “all employees” – Board concluding that the question of the description of a bargaining unit and the wording of the designation are not co-extensive – Board must be sensitive to jurisdictional disputes – Board generally avoiding an all employee unit in the construction industry – Competing jurisdictional claims by intervenors involved in this application – Unit confined to construction labourers

SINCLAIR WELDING LTD.; RE L.I.U.N.A., LOCAL 506; RE I.U.O.E., LOCAL 793; RE B.S.O.I.W., LOCAL 721 (July)

1033

Certification – Bargaining Unit – Construction Industry – Representation Vote – Whether appropriate to include steamfitters in plumbers unit when separate certified trades and employer not employing any steamfitters – Standard unit including steamfitters granted – Irrelevant whether there are employees in all the classifications used to describe that standard unit – Board exercising its discretion to order a representation vote because of improper union conduct

D.E. WITMER PLUMBING AND HEATING LIMITED; RE U.A., LOCAL 527; RE GROUP OF EMPLOYEES; RE BILL HENNINK AND BILL BONVANIE (Oct.)

1228

Certification – Bargaining Unit – Construction Industry – Test to determine whether employee

performing bargaining unit work – Departure from representative period test limiting line of questioning – Employee not spending the majority of his time doing bargaining unit work on application date – Unnecessary to consider any other factor – Application dismissed

DELCO CONTRACTORS, 608322 ONTARIO INC.; RE C.J.A., LOCAL 494 (June) 830

Certification – Bargaining Unit – Construction Industry – Whether any of the respondent's employees employed in the unit on the application date – Respondent's argument that the work of operating the hoists on the project was not the work of the applicant's craft and therefore the performance of it would not have brought any of the respondent's employees within the scope of the unit, rejected – Person hired in violation of the intervener's agreement with the MTABA can be considered an employee of the respondent in a unit other than the one covered by the agreement – Certificates issuing

H & D CONSTRUCTION, MANCHENEEL INVESTMENTS LIMITED C.O.B. AS, AND MIHU HOLDINGS LIMITED; RE I.U.O.E., LOCAL 793; RE L.I.U.N.A., LOCAL 183 (Dec.) 1495

Certification – Bargaining Unit – Construction Industry – Whether drywall tapers employees or independent contractors – Board reviewing its criteria in determining whether an employee is in the bargaining unit for the purpose of the count – Board suggesting use of a “representative period” be eliminated

GILVESY ENTERPRISES INC.; RE P.A.T., LOCAL 1891 (Feb.) 220

Certification – Bargaining Unit – Construction Industry – Whether persons employed to clean up scrap material in apartment building performing work of construction labourers – Clean up of scrap material that at one time may have been left over from construction work and clean up not done with reference to any specific renovation work not the work of construction labourers – Persons excluded from unit – Certificates issuing

MING SUN HOLDINGS INC.; RE L.I.U.N.A., LOCAL 506 (Dec.) 1585

Certification – Bargaining Unit – Craft unit of stationary engineers ceasing to exist when employees absorbed into broader CUPE bargaining unit – IUOE seeking to carve out historical craft unit of stationary engineers formerly represented by CUOE – Carve out not permitted – Application dismissed

TORONTO, THE MUNICIPALITY OF METROPOLITAN; RE I.U.O.E., LOCAL 796; RE C.U.P.E., METROPOLITAN TORONTO CIVIC EMPLOYEES UNION, LOCAL 43 (Feb.) 278

Certification – Bargaining Unit – Dependent Contractor – Related Employer – Union seeking to represent a unit of taxicab drivers and “owner-operators” working “under the banner” of the respondent Yellow Cab – Single car/plate owner-operators found to be dependent contractors – No affirmative evidence that owner-operator/dependent contractors wish to be included in the same unit as the helper-drivers – Two units found to be appropriate, one of dependent contractors and one of drivers – Insufficient evidence that other named respondents are related employers – Matters remitted back to labour relations officer

HAMILTON YELLOW CAB COMPANY LIMITED; RE R.W.D.S.U. (Nov.) 1373

Certification – Bargaining Unit – Employer operating two plants within same municipality – Union organizing only one plant – Whether separate bargaining units appropriate – Substantial community of interest among employees at both plants – Single plant unit not appropriate – Application dismissed

MOBIL CHEMICAL CANADA, LTD.; RE E.C.W.U. (Apr.) 559

Certification – Bargaining Unit – Evidence – Officer conducting inquiry into duties and responsi-

- bilites of "Area Superintendents" – Union denied opportunity to call evidence on duties and responsibilities of employees engaged as "Interpreters" – Board finding that such evidence not within the scope of the officer's inquiry but arguable whether evidence respecting borderline positions can have any relevance in a determination under s.1(3)(b) – Issue should not be the subject of a hearing until officer's inquiry completed
- GRAND RIVER CONSERVATION AUTHORITY; RE O.P.S.E.U.(Nov.) 1371
- Certification – Bargaining Unit – Parties agreeing on bargaining unit description that differed from the standard "office, clerical and technical" description – Board reviewing its role in determining the appropriate bargaining unit when the parties have agreed to a bargaining unit description which departs from the Board's usual practice – Board accepting proposed unit
- HALEY INDUSTRIES LIMITED; RE U.S.W.A.; RE GROUP OF EMPLOYEES(Mar.) 373
- Certification – Bargaining Unit – Persons employed under a co-operative or governmental training program included in bargaining units – *Elizabeth Fry Society of Ottawa* – distinguished
- GREY COUNTY HOMES FOR THE AGED, THE CORPORATION OF THE COUNTY OF GREY OPERATING AS; RE LONDON AND DISTRICT SERVICE WORKERS' UNION, LOCAL 220, S.E.I.U., A.F.L., C.I.O., C.L.C.(Apr.) 508
- Certification – Bargaining Unit – Practice and Procedure – Employer alleging that one-third of employees should be excluded from bargaining unit by operation of s.1(3)(b) – Exclusions sought by employer appearing to be at variance with Board jurisprudence – Examination process for large group of employees time consuming and expensive – Employer directed to file statement elaborating on job functions which would warrant a s.1(3)(b) exclusion
- CATERPILLAR OF CANADA LTD.; RE C.A.W.; RE GROUP OF EMPLOYEES (Feb.) 192
- Certification – Bargaining Unit – Practice and Procedure – Whether Administration Officers and Assistant Branch Managers of trust company exercise managerial functions – Administration Officer Trainees excluded from unit on community of interest grounds – Original panel of Board not seized with remaining issues – Board reviewing its policy concerning the jurisdiction of any panel to consider outstanding issues in certification applications
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- Certification – Bargaining Unit – Pre-Hearing Vote – Panel not adopting the bargaining unit description agreed to by the applicant and respondent as the voting constituency – Use of the phrase "save and except persons in bargaining units for which any trade union held bargaining rights as of . . ." inappropriate – Incumbent had not agreed to this bargaining unit description which deviates from that in the incumbent's collective agreement – Incumbent's bargaining unit description adopted minus language referring to employees of contractors engaged by the respondent – Vote ordered
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- COBI FOODS INC.; RE U.F.C.W. (June) 815
- Certification – Construction Industry – Employer engaged in fabricating and installing metal products in the construction industry – Same work force used for both activities – Respondent’s argument that application should be treated as one made under the general provisions of the Act rejected – Application properly made pursuant to the construction industry provisions
- RIDSDALE STEEL FABRICATORS INC.; RE S.M.W., LOCAL 562; RE EMPLOYEE (Apr.) 601
- Certification – Construction Industry – Petition – Working foreman not actively participating in petition’s origination and circulation but signing it and present throughout process – Working foreman perceived as being managerial – Petition rejected – Applicant certified
- BURL-OAK PAVING LTD.; RE L.I.U.N.A., LOCAL 183; RE GROUP OF EMPLOYEES (Apr.) 474
- Certification – Construction Industry – Practice and Procedure – Application for certification brought under construction industry provisions – Construction industry provisions subsequently found to not be applicable – Employer alleging that procedural fairness required that application be dismissed – Board following its practice of treating the application as though it had been made under the general provisions
- GALLANT PAINTING, JETTE PEDERSEN C.O.B. AS; RE P.A.T., LOCAL 1590; GROUP OF EMPLOYEES (Mar.) 372
- Certification – Construction Industry – Reconsideration – Applicant counsel arguing Board lacked jurisdiction to reconsider its decision to certify because others, including the Minis-

ter, had relied on the decision – Grounds raised by counsel going to discretion and not to jurisdiction to reconsider – Matter relisted for hearing

BRANTCO CONSTRUCTION; RE L.I.U.N.A., LOCAL 1059; RE GROUP OF EMPLOYEES (Apr.) 472

Certification – Construction Industry – Trade Union Status – Respondent an employer in the construction industry and its employees are employees in the construction industry – Whether trade union which does not pertain to construction industry may apply for certification in respect of an employer or employees that are within the construction industry – Applicant may bring application under the general provisions of the Act

PICKERING WELDING & STEEL SUPPLY, KENOYD LIMITED TRADING AS; RE U.S.W.A. (Apr.) 595

Certification – Employee Reference – Union certified after agreement reached with employer that certain employees would be excluded from the unit “for purposes of the count” – Union subsequently applying for a determination of whether these persons are “employees” within the meaning of the Act – Board concluding these persons cannot be the subject of an employee reference – An agreement by the parties that an employee will be excluded from the count for no particular reason cannot form the basis of a certification decision – Application dismissed

IVACO INC., IVACO ROLLING MILLS, DIVISION OF; RE U.S.W.A. (Apr.) 511

Certification – Membership Evidence – Employee objectors submitting that 55.3 percent membership support not “more than 55 percent” as described in s.7(2) – Board treating any fraction of a percentage over 55 as sufficient for automatic certification – Board declining to direct a representation vote – Certificate issuing

ALL TYPE METAL STAMPING LIMITED; RE TEAMSTERS' UNION, LOCAL 879; RE GROUP OF EMPLOYEES (Feb.) 181

Certification – Membership Evidence – Form 80 rejected in earlier certification application because proper inquiries had not been made by the Form 80 declarant – New Form 80's filed in this application – No grounds for barring this application – Earlier decision *res judicata* only with respect to the earlier Form 80 – Board prepared to rely on the evidence of membership and the new Form 80's – Certificates issuing

COUNTY ELECTRIC OF PETERBOROUGH LIMITED; RE I.E.B.E.W., LOCAL 894; RE GROUP OF EMPLOYEES (Dec.) 1485

Certification – Membership Evidence – Parties – Form of evidence acceptable to Board when considering intervener status – Labourers' Union claiming intervener status on the ground that it represented employees in the unit – One of the employees for whom evidence was filed was on the employer's list and represented by the Union when the hearing began – Labourers' Union having status to intervene

LES INGENIERIES CONSBEC INC.; RE I.U.O.E., LOCAL 796; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL, L.I.U.N.A., LOCAL 607 (Nov.) 1402

Certification – Membership Evidence – Practice and Procedure – Earlier decision varied – Respondent not permitted to add further name to employee list when list already amended three times – Incomplete dates on membership cards cured by *viva voce* evidence – Possible ambiguity in documentary evidence concerning whether application one for membership in local or international not fatal because, as a whole, the evidence points unequivocally to membership in the applicant – Certificates issuing

MENKES DEVELOPMENTS INC.; RE L.I.U.N.A., LOCAL 506; RE L.I.U.N.A., LOCAL 183 (Oct.) 1290

- Certification – Membership Evidence – Practice and Procedure – Parties executing minutes of settlement agreeing on all points except whether the Board should count membership cards signed by individuals after their last day worked – Parties’ request for a hearing to make argument on that issue denied – No facts in dispute – More appropriate to receive written submissions
- CATALYTIC MAINTENANCE INC.; RE L.I.U.N.A., LOCAL 1089..... (Dec.) 1479
- Certification – Membership Evidence – Practice and Procedure – Pre-Hearing Vote – Two certification applications consolidated under s. 103(3) and pre-hearing vote ordered – Intervener’s argument that the date under s.9(4) for determining its actual level of membership support should be its actual intervention/application date and not the deemed application date under s.103 rejected – Intervener’s certification application dismissed due to insufficient membership support – New “union/no union” vote ordered
- NORTH YORK, BOARD OF EDUCATION FOR THE CITY OF;
RE O.P.S.E.U..... (Jan.) 116
- Certification – Membership Evidence – Practice and Procedure – Witness – Two non-pay allegations made by respondent – Credibility of collector in issue – Evidence concerning criminal convictions of two witnesses admissible – Collector not in charge of organizing campaign found to have collected two cards without proper payment – All evidence secured by that collector rejected – Lack of credibility of another witness not destroying evidentiary value of membership he collected
- OLYMPIA FLOOR & WALL TILE COMPANY, OLYMPIA & YORK DEVELOPMENTS LIMITED, C.O.B. AS; RE L.I.U.N.A., LOCAL 183; RE GROUP OF EMPLOYEES..... (May) 762
- Certification – Parties – Practice and Procedure – Applicant requesting hearing to determine status of intervener prior to officer examinations – Issues of law to be dealt with after officer has reported to Board – Officer ordered to continue with enquiry
- HOLLINGWORTH DRAIN SERVICES; RE C.J.A., LOCAL 27 (Oct.) 1250
- Certification – Petition – Gap in evidence with respect to physical custody of petition – Failure to adduce direct evidence as to what happened to the petition constituting a material gap in the evidence required to discharge the onus of proving the voluntariness of the petition – Petition given no weight – Certificate issuing
- CANADA DRY BOTTLING COMPANY LTD.; RE U.F.C.W.; RE GROUP OF EMPLOYEES..... (Mar.) 337
- Certification – Petition – Opposition to certification application consisting of the leadership of a pre-existing employee association which had “negotiated” two “contracts” with the employer – Petition found to be voluntary despite fact that petitioners were lead hands, familial relationships with management existed, and association meetings were held on company premises – Long-standing polarization of employees as to unionization key factor in assessment of voluntariness – Vote ordered
- ELGIN HANDLES LIMITED; RE TEAMSTERS’ UNION, LOCAL NO. 141; RE GROUP OF EMPLOYEES (Apr.) 496
- Certification – Petition – Practice and Procedure – Petition filed after terminal date by employee who mistakenly believed he was not in the bargaining unit – Description of unit not amended subsequent to posting – Request to extend terminal date denied – Employees had reasonable notice of proceedings – Employer misleading employee as to his status not sufficient grounds to extend terminal date – Petition untimely
- WE’RE ECONOPRINT FAST, 570662 ONTARIO LIMITED C.O.B. AS; RE ST. CATHARINES TYPOGRAPHICAL UNION NO. 416..... (Mar.) 440

- Certification – Practice and Procedure – One-third of possible bargaining unit employees in dispute – Dispute not affecting applicant's right to certification – Whether interim certificate should issue – Question depends on whether collective bargaining can be meaningful
- CATERPILLAR OF CANADA LTD.; RE C.A.W.; RE GROUP OF EMPLOYEES (Jan.) 27
- Certification – Practice and Procedure – Parties requesting Board amend certificate issued in 1984 to reflect existing configuration of employees – Certificate redundant once collective agreement with recognition clause entered into – Parties able to amend recognition clause of collective agreement to clarify its scope
- PUBLIC SERVICE ALLIANCE OF CANADA; RE ALLIANCE EMPLOYEES' UNION; RE THE OTTAWA TYPOGRAPHICAL UNION, LOCAL 102 (Feb.) 265
- Certification – Practice and Procedure – Pre-Hearing Vote – Applicant requesting Board to direct the respondent to make available a list of names and mailing addresses of all employees in the voting constituency – Board not prepared to entertain request because it was not made at the labour relations officer's meeting convened for the purpose of dealing with all matters arising out of the application and request for a pre-hearing representation vote – Vote directed
- QUEEN'S UNIVERSITY AT KINGSTON; RE O.P.S.E.U.; RE C.U.P.E. (June) 925
- Certification – Practice and Procedure – Pre-Hearing Vote – Each person on voters list challenged by the employer on the basis of managerial or confidential functions – Board requiring detailed written submissions from parties on the duties and responsibilities of the persons in dispute as well as a detailed statement of material facts before determining procedure for the officer's examinations
- ALGOMA STEEL CORPORATION, LIMITED, THE; RE ALGOMA STEEL FRONT-LINE FOREMEN ASSOCIATION; RE U.S.W.A. AND U.S.W.A., LOCALS 2251, 4509, 5595, 2251, 2288 (Nov.) 1341
- Certification – Practice and Procedure – Pre-Hearing Vote – Employees involved in these applications among those whose inclusion in the unit is in dispute in another case where prehearing vote has been held and ballot box sealed – Whether these applications should be postponed pending the outcome of that case, consolidated for hearing with that case pursuant to s.103(3), or processed by ordering a pre-hearing vote as originally applied for – S.103(3) decision deferred and pre-hearing vote ordered
- KIROUAC CONTRACTING LTD.; RE I.W.A.; RE LUMBER AND SAWMILL WORKERS UNION, LOCAL 2693 OF THE C.J.A.; RE C.P.U. (Oct.) 1262
- Certification – Practice and Procedure – Pre-Hearing Vote – Intervener requesting leave to withdraw its request for a pre-hearing vote and requesting that applicant's application be converted from a pre-hearing vote to a regular application – Requests denied – Intervener's application dismissed
- DOMTAR INC., DOMTAR FOREST PRODUCTS, WOODLANDS DIVISION; RE IWA; RE LUMBER AND SAWMILL WORKERS UNION, LOCAL 2693 OF THE C.J.A.; RE C.P.U. (Sept.) 1132
- Certification – Practice and Procedure – Pre-Hearing Vote – Reconsideration – Alleged transfer of bargaining rights between locals after certification application filed – Successor rights application concerning the transfer pending before the Board – Whether alleged successor local should be on the ballot
- QUAKER OATS COMPANY OF CANADA LIMITED, THE; RE QUAKER OATS EMPLOYEES INDEPENDENT UNION (CEREALS); RE U.F.C.W., LOCAL 293 (Dec.) 1602

- Certification – Practice and Procedure – Pre-Hearing Vote – Related Employer – Applicant requesting a pre-hearing vote in ten applications for certification – Applicant also seeking a declaration that the respondents constitute one employer – Board analyzing purpose and effect of pre-hearing vote – Effect of s.1(4) application on bargaining unit issue discussed – All drivers voted with ballots cast by employees of any one respondent separated – Ballots cast by persons alleged to be dependent or independent contractors to be segregated
TAIGA TRUCKING (ONTARIO) 1980 INC., ET AL.; RE I.W.A. (Nov.) 1433
- Certification – Practice and Procedure – Pre-Hearing Vote – Respondent employer asking that pre-hearing representation vote be set aside because of the conduct of an employee supporter of the union in advising another employee that he was not eligible to vote – Employee eligible to vote but not voting – Reasonable diligence test to be applied to determine whether to entertain the employer's objection – Employee having adequate notice of vote – Employee's ability and opportunity to make inquiries concerning the Board's notices not interfered with – Board declining to direct new vote
ONTARIO ENGINEERED SUSPENSIONS (BLENHEIM) LTD.; RE C.A.W. (May) 768
- Certification – Practice and Procedure – Pre-Hearing Vote – Union requesting copy of the mailing list supplied by the employer to the Board for occasional teacher pre-hearing vote – Request allowed – Further requests to be honoured by the Registrar without reference to the Board
LAKEHEAD DISTRICT ROMAN CATHOLIC SEPARATE SCHOOL BOARD, THE; RE O.C.O.T.A.; RE THE NIPISSING DISTRICT ROMAN CATHOLIC SEPARATE SCHOOL BOARD (Sept.) 1154
- Certification – Practice and Procedure – Reconsideration – Unfair Labour Practice – Reconsideration of Board decision not to consolidate representation and unfair labour practice complaints – Purpose and effect of consolidation reviewed – Ordered that matters be heard together but not consolidated
DRESSER CANADA, INC.; RE CAW; RE GROUP OF EMPLOYEES; RE U.S.W.A. (Oct.) 1243
- Certification – Practice and Procedure – Representation Vote – Vote held in part-time and full-time bargaining units – Five employees in part-time unit moving to full-time unit before date vote held but voting in part-time unit – These employees not eligible to vote in either the part-time or the full-time unit – New vote ordered in part-time unit – Voter eligibility rules reviewed
LAPALME NURSING HOME LTD.; RE C.U.P.E.; RE GROUP OF EMPLOYEES (Mar.) 406
- Certification – Practice and Procedure – Respondent asserting that intervention lacked particulars – Board reviewing its policy respecting sufficiency of particulars – Further particulars ordered
PEBRA PETERBOROUGH INC.; RE PEBRA PETERBOROUGH EMPLOYEES ASSOCIATION; RE C.A.W. (Mar.) 421
- Certification – Practice and Procedure – Whether parties' agreement that assistant manager excluded from bargaining unit should result in the extension of the terminal date and the posting of a revised Form 6 Notice to Employees – Extension or reposting unnecessary
WORKER'S CO-OPERATIVE OF CONSUMERS (FORT WILLIAM) LIMITED; RE U.F.C.W., LOCAL 409; RE GROUP OF EMPLOYEES (Feb.) 297
- Certification – Pre-Hearing Vote – Applicant requesting pre-hearing vote but also requesting that the appropriate unit be determined before any vote conducted – Board not having jurisdic-

tion to conduct mid-hearing representation votes – Applicant abandoning its request for a pre-vote hearing – Voting arrangements detailed

PEEL BOARD OF EDUCATION, THE; RE O.S.S.T.F. (July) 1030

Certification – Pre-hearing Vote – Ballots cast in favour of applicant and against applicant equal with one segregated ballot – Agreement of parties that employee who cast segregated ballot included in unit – New vote ordered to protect secrecy of ballot cast by employee

OMSTEAD FOODS LIMITED; RE GREAT LAKES FISHERMEN AND ALLIED WORKERS' UNION (Feb.) 264

Certification – Pre-Hearing Vote – Pre-hearing vote for occasional teachers to be conducted by poll with notice to be given by mail – Respondent ordered to provide mailing labels to Board for all persons on voters' list to facilitate notification – Respondent also ordered to provide applicant with the names and addresses of those on voters' list, either in the form of mailing labels, as requested by the applicant, or in any other convenient form

WELLINGTON COUNTY BOARD OF EDUCATION; RE O.S.S.T.F. (Aug.) 1114

Certification – Pre-Hearing Vote – Voting constituency where only one employee in one of the two units the incumbent union represents – Single voting constituency combining two units appropriate – Each ballot to be segregated – Preliminary objection to timeliness of application to be dealt with after vote – Challenge to bargaining rights of applicant not entertained because no termination application before the Board

WIRE ROPE INDUSTRIES LTD.; RE I.W.A.; RE LUMBER AND SAWMILL WORKERS' UNION, LOCAL 2693 OF THE C.J.A. (Oct.) 1336

Certification – Pre-Hearing Vote – Whether Board should deny request for pre-hearing vote due to complexity of bargaining unit issues involved – Pre-hearing vote denied due to applicant's position that it already had bargaining rights – Pre-hearing vote provisions analyzed

ONTARIO HYDRO; RE THE SOCIETY OF ONTARIO HYDRO PROFESSIONAL AND ADMINISTRATIVE EMPLOYEES; RE C.U.P.E.-C.L.C. ONTARIO HYDRO EMPLOYEES UNION LOCAL 1000; RE THE COALITION TO STOP THE CERTIFICATION OF THE SOCIETY, ON BEHALF OF CERTAIN OBJECTING EMPLOYEES, AND TOM STEVENS (Dec.) 1589

Certification – Representation Vote – Following announcement of the count, union opponents asserting that Board should not give effect to representation vote in favour of union – Allegation of intimidation not raised in a timely manner indicating reaction to outcome of vote rather than atmosphere in which it was conducted – Certificate issuing

CONCORDE METAL STAMPINGS; RE C.A.W.; RE GROUP OF EMPLOYEES (Jan.) 34

Certification – Trade Union Status – Whether local chartered by CLC is a trade union – When charter granted, the contractual relationship necessary was created – No evidence that employees confused about what they were joining – Applicant found to be a trade union – Vote ordered

LAVAL TOOL & MOULD INC.; RE WINDSOR MOULDMAKERS UNION, LOCAL 1680, C.L.C.; RE GROUP OF EMPLOYEES (Oct.) 1281

Certification – Whether s.13 prohibits the Board from certifying the applicant because the local's constitution has a citizenship requirement for membership in the union – Local had been notified earlier to amend its constitution to bring it into conformity with the parent's constitution which contained an anti-discrimination provision but amendment never made –

- Board finding the parent's constitution prevailing over inconsistent provisions in the local's constitution – S.13 not applicable
- BRANTFORD, THE CORPORATION OF THE CITY OF; RE LOCAL UNION NO. 582, INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, AFL-CIO; RE C.U.P.E. (Sept.) 1125
- Certification Where Act Contravened – Bargaining Unit – Unfair Labour Practice – Geographic scope of bargaining units in lumber industry – Comments in letter from employer to employees contravening ss. 64 and 70 – Employees still able to freely express choice in representation vote – Vote ordered
- SYLVOR LIMITEE, SYNCO TIMBER LIMITED; RE LUMBER AND SAWMILL WORKERS' UNION, LOCAL 2995 OF C.J.A.; RE ROGER PAQUIN..... (Jan.) 128
- Certification Where Act Contravened – Charter of Rights and Freedoms – Unfair Labour Practice – Layoff and intimidation of employees, and granting of wage increases constituting unfair labour practices – Letter to employees from president of company proper exercise of employer free speech – Reverse onus not contrary to Charter – Petition rejected – First contract legislation not altering section 8 jurisprudence – Certificate issuing – Unnecessary for union to call every grievor as a witness – All laid-off employees reinstated with compensation
- KNOB HILL FARMS LIMITED; RE U.F.C.W., LOCAL 206; RE GROUP OF EMPLOYEES..... (Dec.) 1531
- Certification Where Act Contravened – Employees laid off in violation of Act – Whether damage done to ability of employees to express wishes repaired by recall of and letter to employees – Small bargaining unit a factor in determining whether a vote would be useful – First contract legislation relevant in assessing the viability of the core of membership support – Certificate issuing pursuant to section 8
- ZENITH WOOD TURNERS INC. AND 148620 CANADA INC.; RE C.J.A., GENERAL WORKERS' UNION, LOCAL 1030 (Nov.) 1443
- Certification Where Act Contravened — Interference in Trade Unions — Unfair Labour Practice — Letter sent by president of respondent suggesting link between unionization and possible loss of jobs going beyond boundaries of freedom of speech — Lead hands not excluded from bargaining unit but acting on behalf of management in violation of sections 64 and 66 — Lay-offs partly motivated by anti-union animus — Employer involvement in employee association designed to diminish appeal of a union violation of Act — Union certified pursuant to section 8
- CAMBRIDGE CANADIAN FOODS INC.; RE U.F.C.W., LOCAL 1000A; RE GROUP OF EMPLOYEES..... (Mar.) 319
- Certification Where Act Contravened — Unfair Labour Practice — Whether wishes of employees not likely to be ascertained in a vote an objective test — Testimony concerning impact of employer misconduct on individual employees excluded — Applicant certified without vote
- ZEST FURNITURE INDUSTRIES LIMITED; RE L.I.U.N.A., LOCAL 183; RE GROUP OF EMPLOYEES (Feb.) 299
- Change in Working Conditions — Collective Agreement — Conciliation — Duty to Bargain in Good Faith — Reference — Unfair Labour Practice — Memorandum of settlement signed by union local's negotiating committee without the signature of ONA's employment relations officer — Employer aware of ONA's practice of bargaining centrally and its refusal to sign an agreement which fails to achieve wage parity with the hospital sector — Employer unable to rely on ostensible authority of negotiating committee — Document null and void

as a collective agreement — Employer breaching duty to bargain in good faith by signing agreement — Breach of freeze by implementing employment terms not agreed to by union — Minister having authority to appoint a conciliation officer

OAKRIDGE VILLA NURSING HOME; RE ONA; RE EXTENDICARE HEALTH SERVICES INC. (July) 1026

Change in Working Conditions — Interference in Trade Unions — Intimidation and Coercion — Remedies — Unfair Labour Practice — Fishing boat captain and crew laid off at height of fishing season during an organizing drive — Removal of licences from boat, denying grievors an opportunity to fish, and failing to pay captain's bonus constituting a breach of the Act — Order directing respondent company to resume its fishing operations and reinstate grievors inappropriate — Compensation awarded for one fishing season — President of corporate respondent personally liable

PERALTA FOODS — ILDA C., 538391 ONTARIO LIMITED C.O.B. AS, AND VITO PERALTA; RE GREAT LAKES FISHERMEN AND ALLIED WORKERS' UNION..... (Sept.) 1162

Change in Working Conditions — Interference in Trade Unions — Intimidation and Coercion — Remedies — Unfair Labour Practice — Unprecedented six-week layoff, withholding of vacation pay and cancellation of summer hours constituting unfair labour practices — Each party required to set out in writing and in detail a complete statement of its position on compensation issue if parties unable to agree on amount of compensation to be paid grievors

UMFREVILLE DISTRICT SCHOOL AREA BOARD; RE C.U.P.E.....(Mar.) 434

Change in Working Conditions — Parties — Unfair Labour Practice — Individual employee not having standing to allege breach of statutory freeze

BLUE LINE TAXI LTD.; RE GREGORY BARRETT; RE THE CORPORATION OF THE CITY OF OTTAWA (Apr.) 470

Change in Working Conditions — Unfair Labour Practice — Employer implementing Sunday hours during freeze period — Process of selection of employees to work voluntary — Due to uniqueness of Sunday, change beyond the employer's protected scheduling rights — Breach of s. 79 — No remedial relief awarded

ANDERSON'S CITY FARM VALU-MART; RE U.F.C.W., LOCAL 1000A (Jan.) 1

Change in Working Conditions — Unfair Labour Practice — Respondent sold and operations rationalized subsequent to onset of freeze — Elimination of profit sharing plan, implementation of incentive plan and selective treatment of employees — Business justification cannot sanction a breach of the freeze provision — Union's authority undercut — Breach of freeze — Consideration of remedial relief deferred

TRIM TRENDS CANADA LIMITED; RE U.S.W.A..... (Apr.) 623

Charter of Rights and Freedoms — Certification Where Act Contravened — Unfair Labour Practice — Layoff and intimidation of employees, and granting of wage increases constituting unfair labour practices — Letter to employees from president of company proper exercise of employer free speech — Reverse onus not contrary to Charter — Petition rejected — First contract legislation not altering section 8 jurisprudence — Certificate issuing — Unnecessary for union to call every grievor as a witness — All laid-off employees reinstated with compensation

KNOB HILL FARMS LIMITED; RE U.F.C.W., LOCAL 206; RE GROUP OF EMPLOYEES (Dec.) 1531

Charter of Rights and Freedoms — Construction Industry Grievance — Evidence — Practice and

Procedure — Respondent objecting to lack of particularity in grievance — Any evidence relevant to issue of violation of collective agreement admissible whether or not specific instances have been particularized — Board determining procedure to be followed in entertaining Charter argument in this case

ARLINGTON CRANE SERVICE LIMITED; RE I.U.O.E., LOCAL 793; RE OPERATING ENGINEERS EMPLOYER BARGAINING AGENCY(Jan.)

7

Charter of Rights and Freedoms — Termination — Timeliness — Application for termination made after the appointment of a conciliation officer — Argument rejected that trade union has an obligation to advise the employees in the unit of its intention to apply for the appointment of a conciliation officer because that cuts off open period for termination applications — Charter argument relating to freedom of association not entertained because Attorneys General had not been notified — Termination application dismissed as untimely

CONNIE STEEL PRODUCTS LIMITED; RE LEONARDO DEPRETE, ET AL.; RE B.S.O.I.W., SHOPMEN'S LOCAL UNION NO. 834 (Oct.)

1225

Collective Agreement — Abandonment — Certification — Trade Union Status — Application arguing intervenor had lost its trade union status by ignoring its constitution for several years — Intervener found to not entirely have abandoned its constitution — Not ceasing to operate as a trade union — Intervenor not having abandoned its bargaining rights through inactivity — Foreman not involved in the administration of the union so as to deem agreement not to be a collective agreement — Collective agreement between intervenor and respondent constituting a bar to the certification application

L'ABBE CONSTRUCTION (ONTARIO) LTD.; RE L.I.U.N.A., LOCAL 527; RE CANADIAN CONSTRUCTION, BUILDING MAINTENANCE AND GENERAL WORKERS' UNION (N.C.C.L.) (Oct.)

1191

Collective Agreement — Adjournment — Construction Industry Grievance — Evidence — Applicant's failure to file collective agreement with its referral not grounds for granting respondent an adjournment — Board entertaining applicant's evidence about what respondent said in prior s. 1(4) proceedings — Onus of proof on applicant but evidentiary burden shifting to respondent — Respondent calling no witnesses — Grievance allowed

BROOME, TERRENCE, RE C.J.A., LOCAL 1316.....(Jan.)

13

Collective Agreement — Bargaining Rights — Construction Industry — Prior Board decision concerning different parties holding that Union could not represent construction labourers in the ICI sector of the construction industry — Applicant seeking declaration that collective agreement with Union unlawful — Analysis of principles of *res judicata* and *in rem* — Prior Board decision is a decision *in rem* — Collective agreement between applicant and Union declared null and void

CONSTRUCTION ASSOCIATION OF THUNDER BAY INC., GENERAL CONTRACTORS' DIVISION OF THE; RE LUMBER AND SAWMILL WORKERS' UNION, LOCAL 2693 OF C.J.A. AND L.I.U.N.A., LOCAL 607, AND L.I.U.N.A. ONTARIO PROVINCIAL DISTRICT COUNCIL; RE ONTARIO PROVINCIAL COUNCIL, C.J.A.(July)

976

Collective Agreement — Bargaining Rights — Construction Industry — Related Employer — Sale of a Business — Respondent requesting that application be dismissed on the basis that no valid collective bargaining rights had ever been obtained by the applicant because the collective agreement was signed when there were no employees in the unit — *Nicholls-Radtke* distinguished — Employer had no present or future need for employees

when collective agreement signed — No valid collective agreement — Sale and related employer issues academic — Application dismissed

EIGHTY-FIVE ELECTRIC, RAYMOND BRISSON C.O.B. AS, AND RICHARD TOMINSKI C.O.B. AS R.T. ELECTRIC; RE I.B.E.W., LOCAL 1687..... (June) 833

Collective Agreement — Bargaining Unit — Certification — Respondent asserting that occasional teachers already covered by subsisting collective agreement covering Bill 100 teachers — Certain terms and conditions of employment relating to occasional teachers included in personnel manual incorporated into collective agreement — Manual cannot constitute a collective agreement for occasional teachers as a result of voluntary recognition — Certificate issuing

LONDON, BOARD OF EDUCATION FOR THE CITY OF; RE O.P.S.T.F.; RE F.W.T.A.O..... (Feb.) 235

Collective Agreement — Bargaining Unit — Certification — Timeliness — Whether collective agreement in existence so as to render certification application untimely — Incumbent union having given timely notice to bargain — Collective agreement expiring — Certification application timely — Only one employee in office unit — Board departing from practice of separating office and plant units

WIRE ROPE INDUSTRIES LTD.; RE I.W.A.; RE LUMBER AND SAWMILL WORKERS' UNION, LOCAL 2693 OF THE C.J.A..... (Dec.) 1613

Collective Agreement — Certification — Employee Reference — Reconsideration — Amendment of certificate sought via reconsideration to exclude position of secretary/clerk — Bargaining unit description in certificate was an agreed-upon one — Since certificate parties have entered into collective agreement — Board will not vary the terms of a certificate once the parties have entered into a collective agreement — Board having jurisdiction to determine whether a person is an employee but jurisdiction exercised only in accordance with *Westmount Hospital* — Request for reconsideration denied

ALMONTE NURSING HOME; RE U.F.C.W. (July) 945

Collective Agreement — Certification — Reconsideration — Application requesting a change of the name on Board certificate as request for reconsideration — Once collective agreement negotiated, certificate spent — Parties able to amend collective agreement to reflect change in corporate name — Reconsideration dismissed

AULT FOODS LIMITED; RE U.F.C.W., LOCAL 175 (Jan.) 12

Collective Agreement — Certification — Whether collective agreement between intervener and respondent constituting a bar to applicant's certification — Board's consent not obtained for early termination of prior agreement — Two agreements covering some of the same employees contrary to Act — Second agreement cannot function as a bar

LAIDLAW WASTE SYSTEMS LTD.; RE TEAMSTERS' UNION, LOCAL 419; RE L.I.U.N.A., OIL AND GAS TECHNICIANS, SERVICE, DOMESTIC & GENERAL WORKERS UNION, LOCAL 1267 (Oct.) 1267

Collective Agreement — Certification — Whether documents to which respondent bound considered to be collective agreements thereby making application untimely — Employees of respondent not constituting an organization of employees and therefore document containing terms and conditions of employment not a collective agreement — Certificate issuing

MICHIPICOTEN, THE CORPORATION OF THE TOWNSHIP OF; RE U.S.W.A.; RE WILLIAM A. LAMON..... (Nov.) 1419

Collective Agreement — Change in Working Conditions — Conciliation — Duty to Bargain in Good Faith — Reference — Unfair Labour Practice — Memorandum of settlement signed

- by union local's negotiating committee without the signature of ONA's employment relations officer — Employer aware of ONA's practice of bargaining centrally and its refusal to sign an agreement which fails to achieve wage parity with the hospital sector — Employer unable to rely on ostensible authority of negotiating committee — Document null and void as a collective agreement — Employer breaching duty to bargain in good faith by signing agreement — Breach of freeze by implementing employment terms not agreed to by union — Minister having authority to appoint a conciliation officer
- OAKRIDGE VILLA NURSING HOME; RE ONA; RE EXTENDICARE HEALTH SERVICES INC. (July) 1026
- Collective Agreement — Reference — Collective agreement between federally certified union and employer purporting to bind successors — Employer becoming bankrupt and provincially regulated employer receiving federally regulated employer's operating authority — Whether union successor rights created by agreement — Parties cannot by the collective agreement bind a third party to their contract — No applicable successor rights legislation — Arbitrator should not be appointed by Minister because no collective agreement in force
- BEACON TRANSIT LINES INCORPORATED; RE TEAMSTERS' UNION, LOCAL 938 (Oct.) 1206
- Colleges Collective Bargaining Act — Duty of Fair Representation — Duty to Bargain in Good Faith — Unfair Labour Practice — Employees seeking to enforce bargaining duty by means of fair representation complaint — Board declining to determine whether breach of bargaining duty — Union's conduct during negotiations not breach of fair representation duty — Complaint dismissed
- ABRAMOWITZ, J. AND B. LYONS, ET AL.; RE O.P.S.E.U., THE ONTARIO COUNCIL OF REGENTS FOR COLLEGES OF APPLIED ARTS AND TECHNOLOGY, AND THE BOARD OF GOVERNORS, SHERIDAN COLLEGE OF APPLIED ARTS AND TECHNOLOGY (Apr.) 455
- Conciliation — Change in Working Conditions — Collective Agreement — Duty to Bargain in Good Faith — Reference — Unfair Labour Practice — Memorandum of settlement signed by union local's negotiating committee without the signature of ONA's employment relations officer — Employer aware of ONA's practice of bargaining centrally and its refusal to sign an agreement which fails to achieve wage parity with the hospital sector — Employer unable to rely on ostensible authority of negotiating committee — Document null and void as a collective agreement — Employer breaching duty to bargain in good faith by signing agreement — Breach of freeze by implementing employment terms not agreed to by union — Minister having authority to appoint a conciliation officer
- OAKRIDGE VILLA NURSING HOME; RE ONA; RE EXTENDICARE HEALTH SERVICES INC. (July) 1026
- Conciliation — Reference — Whether Minister having authority to appoint a conciliation officer when parties have not yet attempted to bargain — Parties need not meet before the Minister can appoint a conciliation officer
- COUNTRYSIDE FARMS LIMITED; RE I.U.O.E., LOCAL 793.....(Nov.) 1365
- Consent to Prosecute — Intimidation and Coercion — Unfair Labour Practice — Witness — Employer alleging respondents misled an arbitrator and intimidated a witness — Complaint found to be an abuse of the Board's process to gain a tactical advantage in respect of other pending complaints — No prima facie case
- FITZHENRY AND WHITESIDE LIMITED; RE T.T.U., LOCAL 91 AND NELSON ROLAND (Apr.) 504
- Consent to Prosecute — Right of Access — Respondent denying access to its premises to an offi-

cial of the applicant in breach of Board's order under s. 11 — Board granting consent to prosecute

GASTON H. POULIN CONTRACTOR LIMITED; RE I.U.O.E., LOCAL 793.... (Feb.) 219

Constitutional Law — Certification — Respondent in business of preparing its customers' materials for mailing in accordance with Canada Post requirements by labelling, pre-sorting and bundling the materials — Whether respondent's labour relations under federal jurisdiction by virtue of s. 91(5) of the *Constitution Act* which assigns exclusive jurisdiction over postal service to the federal government — Board finding respondent to be a customer of Canada Post's services and not a performer of those services — Labour relations of respondent not within federal jurisdiction — Certification issuing

MIS (CANADA) HOLDINGS LTD.; RE E.C.W.U.; RE GROUP OF EMPLOYEES (June) 865

Constitutional Law — Certification — Respondent providing security guard services to Federal Government — Board concluding that constitutional jurisdiction over labour relations for these security guard services fall within federal jurisdiction — Tasks performed necessarily incidental to federal operations — Certification application dismissed

NATIONAL PROTECTIVE SERVICE COMPANY LIMITED; RE U.P.G.W.A., LOCAL 1962..... (Feb.) 245

Constitutional Law — Certification — Respondent's operations including a feed mill, feed warehouse, and seed cleaning mills — Board not having jurisdiction to hear application — *Canada Wheat Board Act* declaring operations to be works for the general advantage of Canada — Mills and warehouses falling within federal jurisdiction

W.G. THOMPSON & SONS LIMITED; RE U.F.C.W.; RE GROUP OF EMPLOYEES (May) 787

Constitutional Law — Certification — Whether Board has constitutional jurisdiction over labour relations relating to the respondent's fish processing business — Respondent operating trucks which transport fish exports to the U.S. — Most government regulations with respect to fish processing under federal jurisdiction — Board finding it has constitutional jurisdiction — Certificate issuing

ETNA FOODS OF WINDSOR LIMITED; RE GREAT LAKES FISHERMEN AND ALLIED WORKERS' UNION..... (Feb.) 210

Construction Industry — Abandonment — Bargaining Rights — Whether union had abandoned its bargaining rights in the ICI sector of the construction industry — Employee bargaining agency continuing to exercise its bargaining rights every two years — Union failing to seek enforcement of the provincial agreement — No abandonment of ICI rights

LORNE'S ELECTRIC, 291360 ONTARIO LIMITED C.O.B. AS; RE I.B.E.W., LOCALS 586 AND 594 (Nov.) 1405

Construction Industry — Accreditation — Bargaining Rights — Certification — Applicant union evolving from an industrial into a construction trade union representing construction labourers — Union as affiliated bargaining agent based on established trade union practice but not part of an employee bargaining agency — Whether applicant entitled to represent construction labourers employed by respondent — Board discussing mandatory system of province-wide bargaining in the construction industry

EKT INDUSTRIES INC.; RE LUMBER AND SAWMILL WORKERS UNION, LOCAL 2693 OF C.J.A.; RE I.U.O.E., LOCAL 793; RE C.J.A., LOCAL 1669; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL, L.I.U.N.A., LOCAL 607; RE TAMARRON GROUP INC.; RE TAMARRON CONSTRUCTION LIMITED (Mar.) 352

Construction Industry — Accreditation — Bargaining Unit — Accreditation sought for low-rise part of residential sector of the construction industry — Accreditation certificate issued in 1973 for entire residential sector but employers association had never exercised the bargaining rights granted in respect of the low-rise part of the residential sector — Earlier refusal by Board to divide the residential sector into high-rise and low-rise parts — Bargaining rights for low-rise part of sector declared abandoned — Pattern of collective bargaining at time application made looked at — Bargaining unit described in terms of low-rise part of residential sector appropriate — Accreditation certificate issuing

INDEPENDENT PLUMBING & HEATING CONTRACTORS ASSOCIATION; RE U.A., LOCAL 46; RE METROPOLITAN PLUMBING & HEATING CONTRACTORS' ASSOCIATION (May)

734

Construction Industry — Bargaining Rights — Bargaining Unit — Certification — Respondent asserting that the bargaining unit proposed by the applicant would encompass employees covered by a collective agreement it has with MTABA — Intervener claiming it represents all non-ICI construction labourers who are employed in accordance with the MTABA agreement — Board finding bargaining rights of intervener not encompassing all of the non-ICI sectors of the construction industry — Not necessary to apply MTABA agreement to dispose of the application — Bargaining unit described as excluding persons covered by subsisting agreements

MENKES DEVELOPMENTS INC.; RE L.I.U.N.A., LOCAL 506; RE L.I.U.N.A., LOCAL 183 (June)

881

Construction Industry — Bargaining Rights — Certification — On date applications filed, none of the respondents had any employees in any of the bargaining units applied for in any of the applications — Applicant already held bargaining rights for all of the employees for whom it sought to be certified — Board explaining construction industry certification applications — Application for certification not an appropriate vehicle for obtaining clarification of what bargaining rights the applicant already holds for which employers pursuant to the EPSCA and ICI provincial agreements — Applications dismissed

BROWN BOVERI HOWDEN INC.; RE U.A.; RE E.P.S.C.A.; RE M.C.A.O.; RE NICHOLLS RADTKE LTD.; RE STATE CONTRACTORS INC.; RE WATTS & HENDERSON LTD. (Mar.)

316

Construction Industry — Bargaining Rights — Certification — Parties — Practice and Procedure — Employer seeking to resile from agreement on employee list and revert to earlier position — Inappropriate for Board to permit employer to resile — Labourers' Union seeking to intervene in carpenters application on the basis that it represented all construction employees of the employer pursuant to a collective agreement between it and the Housing Labour Bureau — Labourers' Union denied intervener status on basis of collective agreement which does not cover carpenters — Labourers' Union granted status to intervene based on membership evidence submitted on date of hearing — Labour relations officer appointed

RUNNYMEDE DEVELOPMENT CORPORATION LIMITED; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183 (Oct.)

1305

Construction Industry — Bargaining Rights — Certification — Reconsideration — Board certifying applicant for ICI sector without a hearing based on its implied assertion that it was not an affiliated bargaining agent — Board later determining that applicant was an affiliated bargaining agent and could not represent ICI sector employees — Whether Board should revoke or amend prior certificate — Certificate revoked

RICHARD D. STEELE CONSTRUCTION (1979) LTD.; RE C.J.A., LOCAL 1030 (Aug.)

1110

Construction Industry — Bargaining Rights — Collective Agreement — Prior Board decision concerning different parties holding that Union could not represent construction labourers in the ICI sector of the construction industry — Applicant seeking declaration that collective agreement with Union unlawful — Analysis of principles of *res judicata* and *in rem* — Prior Board decision is a decision *in rem* — Collective agreement between applicant and Union declared null and void

CONSTRUCTION ASSOCIATION OF THUNDER BAY INC., GENERAL CONTRACTORS' DIVISION OF THE; RE LUMBER AND SAWMILL WORKERS' UNION, LOCAL 2693 OF C.J.A. AND L.I.U.N.A., LOCAL 607, AND L.I.U.N.A. ONTARIO PROVINCIAL DISTRICT COUNCIL; RE ONTARIO PROVINCIAL COUNCIL, C.J.A. (July) 976

Construction Industry — Bargaining Rights — Collective Agreement — Related Employer — Sale of a Business — Respondent requesting that application be dismissed on the basis that no valid collective bargaining rights had ever been obtained by the applicant because the collective agreement was signed when there were no employees in the unit — *Nicholls-Radtke* distinguished — Employer had no present or future need for employees when collective agreement signed — No valid collective agreement — Sale and related employer issues academic — Application dismissed

EIGHTY-FIVE ELECTRIC, RAYMOND BRISSON C.O.B. AS, AND RICHARD TOMINSKI C.O.B. AS R.T. ELECTRIC; RE I.B.E.W., LOCAL 1687 (June) 833

Construction Industry — Bargaining Rights — Reconsideration — Effect of earlier decision to call into question applicant's bargaining relationships with several employers — Stay requested pending full consideration and application to Minister for designation — No legal requirement that power of reconsideration be exercised by the panel making the original decision but no grounds here to reconsider, vary, revoke or stay the original decision

EKT INDUSTRIES INC.; RE LUMBER AND SAWMILL WORKERS UNION, LOCAL 2693 OF THE C.J.A.; RE I.U.O.E., LOCAL 793; RE C.J.A., LOCAL 1669; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL AND L.I.U.N.A., LOCAL 607; RE EKT INDUSTRIES INC., TAMARRON GROUP INC., TAMARRON CONSTRUCTION LIMITED (May) 696

Construction Industry — Bargaining Unit — Certification — Applicant seeking to represent construction labourers of the employer — Applicant requesting clarity note that employees engaged in survey work included in unit — Applicant having a history of representing employees of surveying companies that do not operate as employers in the construction industry — Intervener having a history of acquiring bargaining rights under the construction industry provisions for employees engaged as surveyors and designated to represent surveyors in the I.C.I. sector — Application dismissed — No one on employees list who was a construction labourer who had engaged in survey work and surveying not included in applicant's designation order

STONE & WEBSTER CANADA LIMITED; RE L.I.U.N.A., LOCAL 1036; RE I.U.O.E., LOCAL 793 (Apr.) 607

Construction Industry — Bargaining Unit — Certification — Board reviewing its criteria in determining whether an employee is in the bargaining unit for the purpose of the count — Board suggesting use of a representative period be eliminated

E & E SEEGMILLER LIMITED; RE L.I.U.N.A., LOCAL 493; RE I.U.O.E. (Jan.) 41

Construction Industry — Bargaining Unit — Certification — Construction industry employer and construction industry employees — Trade union not a construction industry trade union — Whether bargaining unit should be described in terms of "all employees" rather than by reference to the trades or crafts that were at work on the date application made — Danger

of fragmentation and disruption if unit limited by trade — All employee unit appropriate — Certificate issuing

PICKERING WELDING & STEEL SUPPLY, KENOYD LIMITED TRADING AS; RE U.S.W.A. (June) 923

Construction Industry — Bargaining Unit — Certification — Labourers' Union requesting an "all employee" unit for persons engaged in the erection and finishing of precast concrete products in the ICI sector — Respondent and intervenors requesting that unit be described in terms of "all construction labourers" — Employee bargaining agency designation order referring to "all employees" — Board concluding that the question of the description of a bargaining unit and the wording of the designation are not co-extensive — Board must be sensitive to jurisdictional disputes — Board generally avoiding an all employee unit in the construction industry — Competing jurisdictional claims by intervenors involved in this application — Unit confined to construction labourers

SINCLAIR WELDING LTD.; RE L.I.U.N.A., LOCAL 506; RE I.U.O.E., LOCAL 793; RE B.S.O.I.W., LOCAL 721..... (July) 1033

Construction Industry — Bargaining Unit — Certification — Representation Vote — Whether appropriate to include steamfitters in plumbers unit when separate certified trades and employer not employing any steamfitters — Standard unit including steamfitters granted — Irrelevant whether there are employees in all the classifications used to describe that standard unit — Board exercising its discretion to order a representation vote because of improper union conduct

D.E. WITMER PLUMBING AND HEATING LIMITED; RE U.A., LOCAL 527; RE GROUP OF EMPLOYEES; RE BILL HENNINK AND BILL BONVANIE (Oct.) 1228

Construction Industry — Bargaining Unit — Certification — Test to determine whether employee performing bargaining unit work — Departure from representative period test limiting line of questioning — Employee not spending the majority of his time doing bargaining unit work on application date — Unnecessary to consider any other factor — Application dismissed

DELCO CONTRACTORS, 608322 ONTARIO INC.; RE C.J.A., LOCAL 494 (June) 830

Construction Industry — Bargaining Unit — Certification — Whether any of the respondent's employees employed in the unit on the application date — Respondent's argument that the work of operating the hoists of the project was not the work of the applicant's craft and therefore the performance of it would not have brought any of the respondent's employees within the scope of the unit, rejected — Person hired in violation of the intervener's agreement with the MTABA can be considered an employee of the respondent in a unit other than the one covered by that agreement — Certificates issuing

H & D CONSTRUCTION, MANCHENEEL INVESTMENTS LIMITED C.O.B. AS, AND MIHU HOLDINGS LIMITED; RE I.U.O.E., LOCAL 793; RE L.I.U.N.A., LOCAL 183 (Dec.) 1495

Construction Industry — Bargaining Unit — Certification — Whether drywall tapers employees or independent contractors — Board reviewing its criteria in determining whether an employee is in the bargaining unit for the purpose of the count — Board suggesting use of a "representative period" be eliminated

GILVESY ENTERPRISES INC.; RE P.A.T., LOCAL 1891 (Feb.) 220

Construction Industry — Bargaining Unit — Certification — Whether persons employed to clean up scrap material in apartment building performing work of construction labourers — Clean up of scrap material that at one time may have been left over from construction work

and clean up not done with reference to any specific renovation work not the work of construction labourers — Persons excluded from unit — Certificates issuing

MING SUN HOLDINGS INC.; RE L.I.U.N.A., LOCAL 506 (Dec.) 1585

Construction Industry — Bargaining Unit — Respondent asserting that applicant must, if it seeks I.C.I. sector bargaining rights, also apply for non-I.C.I. bargaining rights in relation to all Board areas in which the respondent has construction labourers in its employ — Board rejecting argument that applicant required to make its application with respect to more than one geographic area

DAGMAR CONSTRUCTION LIMITED; RE L.I.U.N.A. (Apr.) 480

Construction Industry — Certification — Applicant seeking to be certified to represent construction labourers installing highway lighting — Respondent and interveners contending that employees already covered by “line work agreement” — Whether applicant had established bargaining rights in area at the time the line work agreement was entered into — Employees found to already be covered by the line work agreement — Contention that challenge to application is in the nature of a work jurisdiction claim and as such should not be decided in the context of a certification application dismissed — Application dismissed

STACEY ELECTRIC COMPANY LIMITED; RE L.I.U.N.A., LOCAL 527; RE I.B.E.W. CONSTRUCTION COUNCIL OF ONTARIO AND I.B.E.W., LOCAL 586 (Mar.) 428

Construction Industry — Certification — Employer engaged in fabricating and installing metal products in the construction industry — Same work force used for both activities — Respondents argument that application should be treated as one made under the general provisions of the Act rejected — Application properly made pursuant to the construction industry provisions

RIDSDALE STEEL FABRICATORS INC.; RE S.M.W., LOCAL 562; RE EMPLOYEE (Apr.) 601

Construction Industry — Certification — Employer — Membership Evidence — Practice and Procedure — Applicant refused leave to adduce evidence with respect to payment of a dollar on card which only contained signature on receipt portion — Portion of respondent’s reply alleging unparticularized improprieties struck — Failure to retain legal counsel no excuse for ignorance of Board’s rules — Respondent engaged in painting structures at petrochemical complexes — Painting susceptible of being categorized as either maintenance work or construction work — Painting done for purpose of sustaining existing operations classified as maintenance work — Application for certification not properly made pursuant to construction industry provisions of Act

GALLANT PAINTING, JESSE PEDERSEN C.O.B. AS; RE P.A.T., LOCAL 1590; RE GROUP OF EMPLOYEES (Mar.) 367

Construction Industry — Certification — Employer — Respondent providing construction project management services to owner of project — Order for casual labourers made by owner but persons put to work and paid by construction project manager — Construction project manager the employer for purposes of the Act — Certificates issuing

ANGUS J. MACKINNON CONSULTANTS LIMITED, A.J. MACKINNON & ASSOCIATES; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL (Oct.) 1204

Construction Industry — Certification — Evidence — Practice and Procedure — Challenge to officer’s ruling that respondent limited to introducing evidence relating to the work of the employees on the application date — Appropriate time for dealing with such matters is after the officer’s report is received — Officer directed to continue with enquiry

STRONGLAND CONSTRUCTION LTD.; RE C.J.A., LOCAL 27 (Oct.) 1330

Construction Industry — Certification — Evidence — Practice and Procedure — Union submitting that Board should not entertain employer's evidence on ground it was obtained in violation of Act — Manner in which evidence obtained not a proper basis on which to exercise discretion to refuse to admit relevant evidence

ELGIN CONSTRUCTION COMPANY LIMITED; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL; RE GROUP OF EMPLOYEES(Jan.)

45

Construction Industry — Certification — Individuals carrying on carpentry work at housing project sent by employer to work at the respondent's shopping plaza project — Carpenters' employer acting as project manager for respondent — Whether individuals employees of respondent — Employer project manager acting as carpentry subcontractor — Board declaring that carpenters not employees of the respondent

HEMCO DEVELOPMENTS LIMITED; RE THE CARPENTERS' DISTRICT COUNCIL OF TORONTO AND VICINITY ON BEHALF OF LOCALS 27 AND 1304, C.J.A.(June)

852

Construction Industry — Certification — Membership Evidence — Petition — Inexperienced union organizer "loaning" dollar to two employees when they signed membership cards — Loans not disclosed on Form 80 — History of how Board has dealt with non-pay problems reviewed — No intention to repay money — Loans not bona fide — Failure to disclose loans on declaration causing Board to disregard remainder of membership cards filed despite inexperience of union organizer — Certification dismissed

BELAIR RESTORATION (ONTARIO) INC.; P RE O.P.C.M., LOCAL 172; RE GROUP OF EMPLOYEES(Feb.)

183

Construction Industry — Certification — Petition — Document bearing foreman's signature and signed at the request of the foreman not a voluntary statement of desire — Certificates issuing

THORNTON SAND & GRAVEL LIMITED; RE L.I.U.N.A., LOCAL 1059; RE GROUP OF EMPLOYEES(Oct.)

1331

Construction Industry — Certification — Petition — Representation Vote — Employee absent from work on application date due to injury not included in unit for purposes of the count — Petition found to be voluntary despite fact that petitioner retained same lawyer that represented the employer — Operation of employer suspended during winter season — Vote postponed until employees are employed in the unit

A. VUKOVIC FORMING CO., ANTON VUKOVIC C.O.B. AS; RE L.I.U.N.A., LOCAL 527; RE RICHARD LOOP(Mar.)

311

Construction Industry — Certification — Petition — Working foreman not actively participating in petition's origination and circulation but signing it and present throughout process — Working foreman perceived as being managerial — Petition rejected — Applicant certified

BURL-OAK PAVING LTD.; RE L.I.U.N.A., LOCAL 183; RE GROUP OF EMPLOYEES(Apr.)

474

Construction Industry — Certification — Practice and Procedure — Application for certification brought under construction industry provisions — Construction industry provisions subsequently found to not be applicable — Employer alleging that procedural fairness required that application be dismissed — Board following its practice of treating the application as though it had been made under the general provisions

GALLANT PAINTING, JETTE PEDERSEN C.O.B. AS; RE P.A.T., LOCAL 1590; RE GROUP OF EMPLOYEES(Mar.)

372

Construction Industry — Certification — Practice and Procedure — Pre-Hearing Vote — No one

voting at pre-hearing representation vote conducted at construction site — Applicant conducting no investigation concerning lack of voters nor contacting Board — Three months later applicant's counsel requesting new vote — Objection to vote untimely — Factual basis of objection had come to the attention of the applicant before the deadline for making objections had passed — Certification application dismissed

NIMEL CONSTRUCTION LIMITED; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183 (Oct.) 1299

Construction Industry — Certification — Practice and Procedure — Reconsideration — Counsel for respondent not attending certification hearing — Board certifying union — Respondent requesting reconsideration — Respondent erroneously assuming that hearing would be adjourned based on conversation with Registrar in which Registrar told respondent to write in if it wished to amend its reply — Board denying reconsideration — Notice of hearing clearly setting out consequences of not attending hearing — Absence of counsel through his own false assumptions not a ground for reconsidering decision

SAULT STE. MARIE, THE CORPORATION OF THE CITY OF; RE L.I.U.N.A., LOCAL 1036; RE R.E. MORCAN, C.U.P.E.; RE C.J.A., LOCAL 446 (Oct.) 1319

Construction Industry — Certification — Practice and Procedure — Request for hearing by respondent denied — Short duration of employment not relevant to Board's considerations — Certificates issuing

BLACK & MCDONALD LIMITED; RE S.M.W. (Oct.) 1208

Construction Industry — Certification — Practice and Procedure — Respondent requesting a hearing on basis that certification will cause him hardship — Hearing denied — Certificates issuing

J.C. ELECTRIC, JOHN ANTHONY WAITE C.O.B. AS; RE I.B.E.W., LOCAL 1687 (Oct.) 1251

Construction Industry — Certification — Reconsideration — Applicant counsel arguing Board lacked jurisdiction to reconsider its decision to certify because others, including the Minister, had relied on the decision — Grounds raised by counsel going to discretion and not to jurisdiction to reconsider — Matter relisted for hearing

BRANTCO CONSTRUCTION; RE L.I.U.N.A., LOCAL 1059; RE GROUP OF EMPLOYEES (Apr.) 472

Construction Industry — Certification — Trade Union Status — Respondent an employer in the construction industry and its employees are employees in the construction industry — Whether trade union which does not pertain to construction industry may apply for certification in respect of an employer or employees that are within the construction industry — Applicant may bring application under the general provisions of the Act

PICKERING WELDING & STEEL SUPPLY, KENOYD LIMITED TRADING AS; RE U.S.W.A. (Apr.) 595

Construction Industry — Certification — Whether persons employed as construction labourers on the application date — Three of four persons in dispute found not to be employed as a construction labourer on the application date — Certificates issuing

DARROW DEVELOPMENTS LTD.; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL (Oct.) 1238

Construction Industry — Certification — Whether persons engaged by the respondent as construction inspectors exercising managerial functions — Jurisprudence on managerial functions reviewed — During pre-engineering phase inspectors acting in an advisory and technical role — During construction phase inspectors ensuring government standards for the

- installation of gas pipelines adhered to — Inspectors exercising functions of a para-professional possessed of technical expertise — No direct influence on employment relationship — Inspectors not exercising managerial functions — Certificate issuing for unit consisting of all senior and junior construction inspectors
- NORTHERN AND CENTRAL GAS CORPORATION LIMITED; RE U.A., LOCAL 800; RE GROUP OF EMPLOYEES..... (June) 887
- Construction Industry — Duty of Fair Representation — Intimidation and Coercion — Ratification and Strike Vote — Unfair Labour Practice — Manner in which local union meetings conducted not prima facie breach of fair representation duty — Political differences in union local insufficient to indicate intimidation and coercion — Complaint with respect to entitlement to vote in I.C.I. sector strike vote must be made to Minister under s. 149a and not to Board under s. 72(5) — Complaint dismissed as disclosing no prima facie case with respect to any of the pleaded sections of the Act
- CONNOLLY, MICHAEL AND UCAL POWELL; RE C.J.A., LOCAL 27 (Feb.) 193
- Construction Industry — Jurisdictional Dispute — Practice and Procedure — Sector Determination — Work dispute concerning the installation of storm sewers and catch basins — Whether merits of dispute should be deferred until Board determines into which sector of the construction industry the work in dispute falls
- STEEN CONTRACTORS LIMITED, L.I.U.N.A., LOCAL 597 AND; RE U.A., LOCAL 463; RE MILNE AND NICHOLLS/VANBOTS JOINT VENTURE (Jan.) 137
- Construction Industry — Jurisdictional Dispute — Work assignment dispute involving representation issue as to whether carpenters' or labourers' union will represent carpenters engaged in house framing carpentry in low-rise residential construction — Board exercising its discretion to hear jurisdictional dispute despite fact that representation issue involved — Representation issue merely going to merits of work assignment dispute and to the form of remedy
- TRIMAR CONSTRUCTION, L.I.U.N.A., LOCAL 183, LAKEVIEW ESTATES LTD., 529126 ONTARIO INC. C.O.B. AS; RE C.J.A., LOCAL 1190; RE TORONTO HOUSING LABOUR BUREAU (Apr.) 632
- Construction Industry — Practice and Procedure — Unfair Labour Practice — Unfair labour practice complaint relating to carpentry framework within the residential sector — Complaint dismissed for delay and abuse of process
- TORONTO HOUSING LABOUR BUREAU AND BRAMALEA LIMITED; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183; RE PRESIDENTIAL GROUP LIMITED AND PRESIDENTIAL GROUP (BROOKSHIRE) LIMITED (Sept.) 1178
- Construction Industry — Reference — Whether Minister should issue new designation orders and/or amend existing designation orders to permit union local to lawfully represent workers in the ICI sector of the construction industry
- LUMBER AND SAWMILL WORKERS' UNION, LOCAL 2693 OF THE C.J.A.; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL; RE ONTARIO PROVINCIAL CONFERENCE OF THE B.A.C.; RE I.U.O.E., LOCAL 793; RE O.G.C.A.; RE CONSTRUCTION ASSOCIATION OF THUNDER BAY INC. (Dec.) 1556
- Construction Industry — Representation Vote — Termination — Respondent alleging applicant not entitled to vote because he was not at work in the voting constituency prior to the vote being taken — Voter eligibility rules reviewed — Individual must be "at work in" the voting constituency both on date vote is ordered and date vote is held in construction industry termination vote — "At work in" requiring physical presence at work — Employee need

not be at work in the voting constituency between the two material dates to be eligible to vote — Bargaining rights terminated

CITY PLUMBING (KITCHENER) LIMITED; RE RICHARD GRANDY; RE THE ONTARIO PIPE TRADES COUNCIL OF THE U.A., LOCAL 527 (June) 810

Construction Industry — Sale of a Business — Cash proceeds from the liquidation of a partnership business used to start a new general contracting business by one of the partners — Essence of a business in a bid-oriented sector of the construction industry resides in management personnel's expertise — Transfer of key man services constituting sale of a business

STUCOR CONSTRUCTION LTD.; RE I.U.O.E., LOCAL 793; RE STEWART & HINAN CONSTRUCTION LIMITED, STEWART & HINAN CONTRACTORS LIMITED, STUCOR CONSTRUCTION LTD., RESOURCE EQUIPMENT LIMITED (Apr.) 614

Construction Industry — Strike — Union business representative indicating to applicant's project manager that if applicant used a non-union sub-contractor an information picket line would be set up — Applicant seeking a remedy enjoining any further threats and an order enjoining picketing — Union representative having no intention of setting up picket line — Board refusing to exercise its discretion to grant any remedy — Application dismissed

ACME BUILDING AND CONSTRUCTION LIMITED; RE P.A.T., LOCAL 1671 AND ARTHUR VERNERS (Feb.) 179

Construction Industry Grievance — Adjournment — Collective Agreement — Evidence — Applicant's failure to file collective agreement with its referral not grounds for granting respondent an adjournment — Board entertaining applicant's evidence about what respondent said in prior s. 1(4) proceedings — Onus of proof on applicant but evidentiary burden shifting to respondent — Respondent calling no witnesses — Grievance allowed

BROOME, TERENCE; RE C.J.A., LOCAL 1316 (Jan.) 13

Construction Industry Grievance — Adjournment — Practice and Procedure — No one appearing at hearing on behalf of respondent and matter proceeding — Board's attention drawn day after hearing to telex received morning of hearing from respondent stating he would like the hearing rescheduled — Board's practice on adjournments reviewed — Adjournment would not have been granted on the basis of the telex message in any event — Non-union hire contrary to collective agreement — Compensation awarded

CATALYST TECHNOLOGY (CANADA) LTD.; RE B.B.F., LODGE 128 (June) 803

Construction Industry Grievance — Applicant union grieving that a member of another local was employed without having a referral slip — Employer seeking to rely on the provisions of the union's constitution governing members' use of travel cards — Union constitution cannot confer any rights on the employer nor can its mere existence give rise to an estoppel — Employer found to have violated collective agreement

SUTHERLAND AND SCHULTZ LIMITED; RE U.A., LOCAL 463 (Sept.) 1174

Construction Industry Grievance — Charter of Rights and Freedoms — Evidence — Practice and Procedure — Respondent objecting to lack of particularity in grievance — Any evidence relevant to issue of violation of collective agreement admissible whether or not specific instances have been particularized — Board determining procedure to be followed in entertaining Charter argument in this case

ARLINGTON CRANE SERVICE LIMITED; RE I.U.O.E., LOCAL 793; RE OPERATING ENGINEERS EMPLOYER BARGAINING AGENCY (Jan.) 7

Construction Industry Grievance — Damages — Reconsideration — Union seeking reconsidera-

- tion of Board decision not to award damages for breach of collective agreement because union failed to establish that union members were available to perform the work in question — Reconsideration dismissed — Board having no evidence before it from which it could quantify the loss — Applicant not entitled to damages whether or not it had established the loss — Board having no authority to punish an employer for a breach of the collective agreement
- PIGGOTT CONSTRUCTION LIMITED; RE I.U.O.E., LOCAL 793 (Apr.) 599
- Construction Industry Grievance — Discharge — Discharge of employee who left job site without permission — Analysis of principles of progressive discipline and just cause in the construction industry — Five day suspension substituted for discharge
- COMSTOCK INTERNATIONAL LTD.; RE B.B.F., LOCAL 128..... (May) 667
- Construction Industry Grievance — Grievor mechanic laid off and not recalled — Explicit requirement in collective agreement that employer exercise its rights in a fair and reasonable manner — Board finding contravention of collective agreement but recall or seniority rights not to be read into “fair and reasonable” clause
- J.H. LOCK & SONS LIMITED; RE U.A., LOCAL 787..... (Jan.) 62
- Construction Industry Grievance — Jurisdictional Dispute — Parties — Work assignment dispute underlying cause of grievance — Whether Board should decide in a grievance the correctness of a work assignment to members of a trade union other than the trade union which is one of the parties to the grievance — Whether the other trade union should be made a party to the referral for the limited purpose of deciding the correctness of the assignment — Board declining to adjudicate the work assignment dispute in the context of a grievance proceeding — Board refusing to make other union a party to the grievance proceeding
- COPPER CLIFF MECHANICAL CONTRACTORS LTD.; RE MILLWRIGHT DISTRICT COUNCIL ON BEHALF OF LOCAL 1425; RE IRONWORKERS DISTRICT COUNCIL, B.S.O.I.W., LOCAL 786 (Nov.) 1357
- Construction Industry Grievance — Practice and Procedure — Principals of respondents failing to appear at hearing although given notice and properly subpoenaed — Board issuing Sheriff’s warrant for their arrest — Board authority to issue arrest warrants reviewed
- WALPAT GLASS & ALUMINUM PRODUCTS LTD. AND M & I ALUMINUM LTD.; RE P.A.T., LOCAL 1795; RE P.A.T., LOCAL 1819 (July) 1049
- Construction Industry Grievance — Prohibition in collective agreement from using non-union subcontractors — Prohibition postponed until later date — Whether collective agreement prohibiting the use of such contracting as of that date regardless of when the sub-contracting arrangements were entered into or whether only restricting the respondent from entering into new sub-contracting arrangements after that date — Intention was that as of that date all non-union contracting work would cease — Violation of collective agreement
- RUNNYMEDE DEVELOPMENT CORPORATION LTD.; RE I.U.O.E., LOCAL 793 (Nov.) 1423
- Construction Industry Grievance — Reconsideration — Earlier decision to allow grievance revoked because intervener had not received notice of the hearing — Applicant’s counsel undertaking to assist respondent’s counsel to recover compensation paid pursuant to earlier decision
- CATALYST TECHNOLOGY (CANADA) LTD.; RE B.B.F., LODGE 128; RE BOILERMAKER CONTRACTORS’ ASSOCIATION (Sept.) 1131
- Construction Industry Grievance — Respondent bound by collective agreement in respect of construction industry work — Issue as to whether respondent bound in respect of non-con-

struction work in the field — Board's jurisdiction under s. 124 not confined to grievances which pertain exclusively to construction work

BABCOCK AND WILCOX CANADA LTD.; RE QUALITY CONTROL COUNCIL OF CANADA(Aug.) 1053

Construction Industry Grievance — Respondent refusing to rehire grievor, although properly referred according to the hiring hall procedure, on basis that the grievor had refused to pay money claimed by the respondent for lost equipment — Employer having right to reject persons who in the employer's opinion are not competent or qualified — Employer not entitled to reject based upon any explicit right in the collective agreement because non-payment of money not related to competency — Implicit residual discretion to reject cannot stand in the face of the explicit clauses in the agreement — Even if implied right to reject, employer's rejection unreasonably exercised — Compensation beyond amount owed by grievor directed

ONTARIO HYDRO AND E.P.S.C.A.; RE U.A. AND U.A., LOCAL 463 (June) 899

Construction Industry Grievance — Strike — Employer alleging that no strike provision in collective agreement violated — Board finding violation of provision initiated by union representatives at the behest of the union president who was using the powers of his office to punish the employer for refusing to give him an unsecured personal loan — Board making declaration of breach of collective agreement and awarding damages for wages the employer paid to its employees for hours which they did not work

BELMONT PLASTERING CO., BEN PLASTERING LIMITED, C.O.B. AS; RE DRY-WALL, ACOUSTIC, LATHING AND INSULATION, LOCAL 675, C.J.A.(Nov.) 1347

Construction Industry Grievance — Timeliness — Whether applicant employer can recover an alleged improper overpayment, as against an individual employee, through a grievance formally against a trade union but specifying the individual concerned — Application dismissed for delay — Pursuit of redress in another forum not constituting reasonable grounds for delay in filing a complaint with the Board

ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION, THE; RE B.S.O.I.W.(Aug.) 1079

Construction Industry Grievance — Trade union alleging Hydro unreasonably refused to hire grievor — Hydro having general practice of advising the union and the employee when a discharged employee is not eligible to be re-hired — Grievor not advised at time of discharge that he could not be re-hired — Refusal to re-hire unreasonable — Hydro ordered to employ grievor

ONTARIO HYDRO, E.P.S.C.A. AND; RE I.B.E.W., LOCAL 1788 (Apr.) 589

Construction Industry Grievance — Union alleging employer breached successive collective agreements by failing to remit correct amounts of benefit contributions and union dues — Union requesting that remedy cover all breaches since 1978 — Board analyzing its remedial jurisdiction with respect to prior agreements and the effect of contractual time limits for the delivery of a grievance — Remedy extended to breaches of current agreement and most recently expired collective agreement

ONTARIO HYDRO, E.P.S.C.A. AND; RE B.S.O.I.W. (Apr.) 574

Construction Industry Grievance — Whether in circumstances it was appropriate for the Board to exercise its discretion to substitute some other penalty for the suspension imposed by the respondent on the grievor — Deference by arbitrator appropriate as long as employer considers only relevant factors when imposing discipline — Disciplinary response must fall

within range of just and reasonable penalties — Ten day suspension substituted for suspension imposed by employer

NADROFSKY CORPORATION; RE I.U.O.E., LOCAL 793..... (May) 747

Crown Transfer — Bargaining Unit — Representation Vote — Board declaring KBM to be a successor employer and determining appropriate bargaining unit — Board declining to exercise its discretion to order a representation vote of the employees in the unit because no intermingling of employees and only one union involved

KBM FORESTRY CONSULTANTS INC., THE CROWN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTRY OF NATURAL RESOURCES AND; RE O.P.S.E.U. (July) 1007

Crown Transfer — Reforestation work contracted to KBM by Crown — KBM providing its own major equipment and mostly its own work force — Broad interpretation of *Successor Rights (Crown Transfers) Act* not limited by Board jurisprudence on sale of a business provision in *Labour Relations Act* — Board finding transfer of work — KBM bound by collective agreement between Crown and OPSEU

KBM FORESTRY CONSULTANTS INC., THE CROWN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTRY OF NATURAL RESOURCES AND; RE O.P.S.E.U. (Mar.) 399

Damages — Construction Industry Grievance — Reconsideration — Union seeking reconsideration of Board decision not to award damages for breach of collective agreement because union failed to establish that union members were available to perform the work in question — Reconsideration dismissed — Board having no evidence before it from which it could quantify the loss — Applicant not entitled to damages whether or not it had established the loss — Board having no authority to punish an employer for a breach of the collective agreement

PIGGOTT CONSTRUCTION LIMITED; RE I.U.O.E., LOCAL 793 (Apr.) 599

Damages — Practice and Procedure — Unfair Labour Practice — Respondent's business records voluminous — Inappropriate for Board to direct respondent to move the documents away from its premises to allow the complainant to inspect them for purpose of assessment of damages — Amount of wages and benefits paid to employees working as strike replacements considered relevant to the assessment of damages

SHAW-ALMEX INDUSTRIES LIMITED; RE U.S.W.A.; RE GROUP OF EMPLOYEES (July) 1032

Damages — Remedies — Unfair Labour Practice — Duty of unfair labour practice complainant to mitigate damages not paralleling that of a former employee in a wrongful dismissal action — Complainant making reasonable efforts to mitigate her losses — Board having jurisdiction to award damages for mental distress but such damages denied here because claim made too late

JACMORR MANUFACTURING LIMITED; RE U.F.C.W. (Aug.) 1086

Damages — Unfair Labour Practice — Complaints relisted for hearing for the purpose of determining quantum of damages — Damages for loss of opportunity to negotiate a collective agreement discussed — Interest rate determined for complaints that were filed in different months — Costs denied — Respondent ordered to compensate union for half of its reasonable negotiating expenses — Union entitled to be reimbursed for costs incurred in producing materials regarding the lock-out — Duty of locked out employees to mitigate their

damages reviewed — Lock-out pay provided to employees by the international union a compensable loss

BURLINGTON NORTHERN AIR FREIGHT (CANADA) LTD.; RE T.T.U., LOCAL 91; RE RICK BEST.....(Aug.) 1064

Dependent Contractor — Bargaining Unit — Certification — Related Employer — Union seeking to represent a unit of taxicab drivers and “owner-operators” working “under the banner” of the respondent Yellow Cab — Single car/plate owner-operators found to be dependent contractors — No affirmative evidence that owner-operator/dependent contractors wish to be included in the same unit as the helper-drivers — Two units found to be appropriate, one of dependent contractors and one of drivers — Insufficient evidence that other named respondents are related employers — Matter remitted back to labour relations officer

HAMILTON YELLOW CAB COMPANY LIMITED; RE R.W.D.S.U.(Nov.) 1373

Dependent Contractor — Certification — Home day care workers dependent contractors — Source of funding irrelevant to determination

ANDREW FLECK CHILD CENTRE, OTTAWA DAY NURSERY INC. C.O.B. AS; RE O.P.S.E.U.....(Jan.) 5

Dependent Contractor — Employee Reference — Partners carrying on business of pole line construction and blasting — Whether individuals are dependent contractors in relation to the respondent — Individuals in issue opposing application — Board jurisprudence with respect to s. 106(2) and to the determination of the status of dependent contractor reviewed — Individuals found to be independent contractors — Application dismissed

ONTARIO HYDRO (LINE WORK — TWEED AREA OFFICE); RE C.U.P.E.-C.L.C., ONTARIO HYDRO EMPLOYEES UNION, LOCAL 1000; RE MCBEATH BROTHERS CONTRACTING(June) 915

Discharge — Construction Industry Grievance — Discharge of employee who left job site without permission — Analysis of principles of progressive discipline and just cause in the construction industry — Five day suspension substituted for discharge

COMSTOCK INTERNATIONAL LTD.; RE B.B.F., LOCAL 128.....(May) 667

Discharge — Health and Safety — Complainants alleging that respondent discharged them to prevent them from raising further safety problems — Employer maintaining the discharges resulted from the complainants disrupting the workplace and refusing to do their regular work — Complainants were not authorized health and safety representatives but were doing safety inspections on company time — OHSA not authorizing employees to act as self-appointed safety representatives — Employees not terminated because they were exercising rights under OHSA — Five-day suspension substituted for two of three discharges

COMMONWEALTH CONSTRUCTION COMPANY, A DIVISION OF GUY F. ATKINSON LTD.; RE RALPH MARION ET AL.....(July) 961

Duty of Fair Referral — Duty of Fair Representation — Intimidation and Coercion — Unfair Labour Practice — Union revoking permission granted complainants to work at Hydro — Complainants refusing to pay fines imposed for continuing to work — Union refusing to refer complainants out of hiring hall — Complaint of unfair labour practices dismissed

CRADDOCK, JOHN, ET AL.; RE U.A., LOCAL 527.....(Dec.) 1488

Duty of Fair Referral — Duty of Fair Representation — Remedies — Unfair Labour Practice — Union paying legal fees incurred by respondent in Board proceedings but not those of complainants — No breach of fair representation duty — Board having no jurisdiction to act as watch-dog over internal union processes — No circumstances to warrant departure from

policy of declining to award costs — Hearings protracted by both parties — Complainants' mixed success also militating against an award of costs

D'ALESSANDRO, LUCIANO AND DONATO MARINARO; RE L.I.U.N.A., LOCAL 1089, AND ROCCO D'ANDREA..... (July) 986

Duty of Fair Representation — Arbitration — Practice and Procedure — Remedies — Unfair Labour Practice — Direction to arbitration inappropriate remedy for union's breach of fair representation duty when dispute between union and complainant — Board hearing merits of grievance — Rules applicable to court proceedings used to calculate interest on lost wages — Costs denied

LECUYER, GERALD, ET AL.; RE C.P.U., LOCAL 132 AND C.P.U.; RE ABITIBI-PRICE INC. (Apr.) 529

Duty of Fair Representation — Colleges Collective Bargaining Act — Duty to Bargain in Good Faith — Unfair Labour Practice — Employees seeking to enforce bargaining duty by means of fair representation complaint — Board declining to determine whether breach of bargaining duty — Union's conduct during negotiations not breach of fair representation duty — Complaint dismissed

ABRAMOWITZ, J. AND B. LYONS, ET AL.; RE O.P.S.E.U., THE ONTARIO COUNCIL OF REGENTS FOR COLLEGES OF APPLIED ARTS AND TECHNOLOGY, AND THE BOARD OF GOVERNORS, SHERIDAN COLLEGE OF APPLIED ARTS AND TECHNOLOGY (Apr.) 455

Duty of Fair Representation — Construction Industry — Intimidation and Coercion — Ratification and Strike Vote — Unfair Labour Practice — Manner in which local union meetings conducted not prima facie breach of fair representation duty — Political differences in union local insufficient to indicate intimidation and coercion — Complaint with respect to entitlement to vote in I.C.I. sector strike vote must be made to Minister under s. 149a and not to Board under s. 72(5) — Complaint dismissed as disclosing no prima facie case with respect to any of the pleaded sections of the Act

CONNOLLY, MICHAEL AND UCAL POWELL; RE C.J.A., LOCAL 27 (Feb.) 193

Duty of Fair Representation — Duty of Fair Referral — Intimidation and Coercion — Unfair Labour Practice — Union revoking permission granted complainants to work at Hydro — Complainants refusing to pay fines imposed for continuing to work — Union refusing to refer complainants out of hiring hall — Complaint of unfair labour practices dismissed

CRADDOCK, JOHN, ET AL.; RE U.A., LOCAL 527..... (Dec.) 1488

Duty of Fair Representation — Duty of Fair Referral — Remedies — Unfair Labour Practice — Union paying legal fees incurred by respondent in Board proceedings but not those of complainants — No breach of fair representation duty — Board having no jurisdiction to act as watch-dog over internal union processes — No circumstances to warrant departure from policy of declining to award costs — Hearings protracted by both parties — Complainants' mixed success also militating against an award of costs

D'ALESSANDRO, LUCIANO AND DONATO MARINARO; RE L.I.U.N.A., LOCAL 1089, AND ROCCO D'ANDREA..... (July) 986

Duty of Fair Representation — Practice and Procedure — Events comprising complaint taking place in 1983 — Complaint filed in 1984 — Union's timeliness objection dismissed in 1985 and matter adjourned — Complainant failing to bring matter back on for a hearing for two years — Board declining to entertain complaint on the basis of delay resulting from the complainant's failure to pursue the matter without a satisfactory explanation

BARANOWSKI, MICHAEL; RE TEAMSTERS' UNION, LOCAL 938 AND TNT CANADA INC., C.O.B. AS TNT RAILFAST (May) 645

- Duty of Fair Representation — Practice and Procedure — Unfair Labour Practice — Employer asking that it be named as an intervener rather than as a respondent — Board finding it desirable that employer be named as a respondent in a duty of fair representation complaint — No breach of duty by union in refusing to take complainant's discharge grievance to arbitration
- HABIB, JOSEPH E.; RE GENERAL MOTORS OF CANADA LIMITED; RE U.A.W., LOCAL 1973..... (Dec.) 1501
- Duty of Fair Representation — Practice and Procedure — Unfair Labour Practice — Whether complaint should be dismissed on the basis of approximately two years — Delay caused by lack of sophistication, need to obtain legal aid, and change of solicitors — Delay may be taken into account in respect of remedy — Board declining to dismiss complaint — Further hearings scheduled
- HINKSON, GEORGE; RE CANADIAN CONFERENCE OF TEAMSTERS, CHEMICAL, ENERGY & ALLIED WORKERS DIVISION, LOCAL 2177; RE BASF INMONT CANADA INC..... (Oct.) 1246
- Duty of Fair Representation — Settlement reached between union and Domgroup following conversion of Dominion Stores into franchises known as Mr. Grocer stores — Complainant without job as a result of settlement — No breach of fair representation duty by union when reaching settlement — Union reached best settlement it could under circumstances
- DI CESARE, SALVATORE; RE R.W.D.S.U., LOCAL 414; RE DOM GROUP.. (May) 692
- Duty of Fair Representation — Unfair Labour Practice — Allegation that union did not investigate complainant's discharge grievance — Board discussing extent of union's responsibility to investigate grievances — Investigation found to be inadequate considering serious nature of grievance — Grievor's lack of effort in aiding the investigation not ameliorating approach of union — Grievance ordered to arbitration
- MCLEOD, RAYMOND; RE CAMCO INC. AND U.E., LOCAL 550..... (Apr.) 547
- Duty of Fair Representation — Unfair Labour Practice — Complainant represented at an arbitration hearing by a union staff representative — Discharge upheld — Union not breaching duty by not hiring a lawyer for arbitration — Complaint dismissed
- BLAIR, WINSTON ALFONSO; RE U.S.W.A.; RE MIDAS CANADA INC. AND INTERNATIONAL PARTS MANUFACTURING LIMITED (Oct.) 1211
- Duty of Fair Representation — Unfair Labour Practice — Earlier s. 68 complaint resulting in Board directing that grievance be reinstated and rescheduled for arbitration — Board indicating in earlier decision that union had a right to settle the grievance prior to arbitration — Executive Board of union accepting a settlement that was unacceptable to the complainant — No breach of fair representation duty
- LEIBMAN, JEAN; RE YORK UNIVERSITY STAFF ASSOCIATION AND YORK UNIVERSITY..... (July) 1011
- Duty of Fair Representation — Unfair Labour Practice — Employer requesting that grievance proceed to arbitration but union refusing — Complainant alleging that union vice-president influenced by hostility towards employer — Board finding that union acting to correct mistaken interpretation of collective agreement by employer — Union acting in best interest of employees in bargaining unit — Complaint dismissed
- COSTA, MARIA FATIMA; RE L.I.U.N.A., LOCAL 183; RE BURLINGTON CANADA INC..... (Feb.) 199
- Duty of Fair Representation — Unfair Labour Practice — Grievor complaining about manner in which employer eliminated his job — Union refusing to process grievance to arbitration —

Respondent may not rely in its defence on facts asserted in argument but not addressed in evidence nor is the mere belief of a respondent that it has not violated the Act of any assistance — No breach of duty — Complaint dismissed

GATTELLARO, DOMENIC; RE U.A.W., LOCAL 222; RE CADBURY CANADA MARKETING INC.	(June)	844
Duty of Fair Representation — Unfair Labour Practice — No collective agreement in effect when grievance filed — Preliminary objection to Board jurisdiction dismissed — Fair representation duty continues after expiry of agreement — One and one half year delay in processing complainant's grievance that employer did not recall complainant during layoff — No explanation for delay — Non-caring attitude constituting arbitrary conduct — Union ordered to process grievance		
XERRI, GEORGE; RE LOCAL 112 U.A.W. CANADA.....	(Mar.)	444
Duty of Fair Representation — Unfair Labour Practice — Part-time and full-time employees paying union dues according to same formula — Part-time employees paying proportionately more of their wages as dues — Whether dues structure "fair" outside scope of fair representation duty — Complaint dismissed		
FRY, BRIAN; RE TEAMSTERS UNION, LOCAL 419.....	(Mar.)	365
Duty of Fair Representation — Unfair Labour Practice — Refusal to file discharge grievance because union thought requested remedy was inappropriate constituting arbitrary conduct — Declaration of breach of Act sole remedy		
HOWES, HOWARD J.; RE U.S.W.A., LOCAL 8222; RE DUOMATIC OLSEN INC.	(Jan.)	55
Duty of Fair Representation — Unfair Labour Practice — Union implementing a pension plan over the objections of most of the employees who would be covered by the plan — Union entitled to adopt a course of action other than that favoured by most employees once views of employees taken into account — Reasonable for union to conclude that long-run interests of bargaining unit members as a whole would benefit from the introduction of a pension plan — No breach of fair representation duty		
DANIELL, JOHN; RE TEAMSTERS' UNION.....	(July)	990
Duty to Bargain in Good Faith — Change in Working Conditions — Collective Agreement — Conciliation — Reference — Unfair Labour Practice — Memorandum of settlement signed by union local's negotiating committee without the signature of ONA's employment relations officer — Employer aware of ONA's practice of bargaining centrally and its refusal to sign an agreement which fails to achieve wage parity with the hospital sector — Employer unable to rely on ostensible authority of negotiating committee — Document null and void as a collective agreement — Employer breaching duty to bargain in good faith by signing agreement — Breach of freeze by implementing employment terms not agreed to by union — Minister having authority to appoint a conciliation officer		
OAKRIDGE VILLA NURSING HOME; RE ONA; RE EXTENDICARE HEALTH SERVICES INC.	(July)	1026
Duty to Bargain in Good Faith — Colleges Collective Bargaining Act — Duty of Fair Representation — Unfair Labour Practice — Employees seeking to enforce bargaining duty by means of fair representation complaint — Board declining to determine whether breach of		

bargaining duty — Union's conduct during negotiations not breach of fair representation duty — Complaint dismissed

ABRAMOWITZ, J. AND B. LYONS, ET AL.; RE O.P.S.E.U., THE ONTARIO COUNCIL OF REGENTS FOR COLLEGES OF APPLIED ARTS AND TECHNOLOGY, AND THE BOARD OF GOVERNORS, SHERIDAN COLLEGE OF APPLIED ARTS AND TECHNOLOGY (Apr.) 455

Duty to Bargain in Good Faith — Interference in Trade Unions — Remedies — Unfair Labour Practice — Employer failing to meet with union to bargain within 15 day period — Employer engaging in course of conduct intended to thwart any meaningful bargaining — Conduct viewed in context of massive unfair labour practices during organizing drive — Breach of duty to bargain in good faith — Attendance of member of management at union meeting contravening ss. 64 and 70 — Employer directed to prepare a collective agreement it is prepared to sign to be presented to union at a meeting with a mediator

MOREWOOD INDUSTRIES LIMITED; RE C.J.A., GENERAL WORKERS' UNION, LOCAL 1030..... (Jan.) 92

Duty to Bargain in Good Faith — Unfair Labour Practice — Employer refusing to provide, when requested, the salaries being paid to each employee represented by the complainant — Same issue coming up at every negotiating round over the years — Board finding no justification for the notion that individual wage rates are confidential — Union not waiving the right to such information merely because it has bargained with respect to it — Breach of duty

GLOBE AND MAIL, THE, DIVISION OF CANADIAN NEWSPAPERS COMPANY LIMITED; RE SOUTHERN ONTARIO NEWSPAPER GUILD, LOCAL 87 THE NEWSPAPER GUILD (Nov.) 1368

Employee Reference — Certification — Collective Agreement — Reconsideration — Amendment of certificate sought via reconsideration to exclude position of secretary/clerk — Bargaining unit description in certificate was an agreed-upon one — Since certificate parties have entered into collective agreement — Board will not vary the terms of a certificate once the parties have entered into a collective agreement — Board having jurisdiction to determine whether a person is an employee but jurisdiction exercised only in accordance with *Westmount Hospital* — Request for reconsideration denied

ALMONTE NURSING HOME; RE U.F.C.W. (July) 945

Employee Reference — Certification — Union certified after agreement reached with employer that certain employees would be excluded from the unit "for purposes of the court" — Union subsequently applying for a determination of whether these persons are "employees" within the meaning of the Act — Board concluding these persons cannot be the subject of an employee reference — An agreement by the parties that an employee will be excluded from the count for no particular reason cannot form the basis of a certification decision — Application dismissed

IVACO INC., IVACO RILLING MILLS, DIVISION OF; RE U.S.W.A. (Apr.) 511

Employee Reference — Computer systems manager having considerable authority over employees with respect to computer systems although not their department head — Introduction of computer systems having impact on numbers of employees needed — Computer systems manager not an employee because he exercises managerial functions

AJAX, THE TOWN OF; RE C.U.P.E., LOCAL 54 (Sept.) 1117

Employee Reference — Dependent Contractor — Partners carrying on business of pole line construction and blasting — Whether individuals are dependent contractors in relation to the respondent — Individuals in issue opposing application — Board jurisprudence with

respect to s. 106(2) and to the determination of the status of dependent contractor reviewed — Individuals found to be independent contractors — Application dismissed

ONTARIO HYDRO (LINE WORK — TWEED AREA OFFICE); RE C.U.P.E. — C.L.C., ONTARIO HYDRO EMPLOYEES UNION, LOCAL 1000; RE MCBEATH BROTHERS CONTRACTING (June) 915

Employee Reference — Employee terminated for alleged theft one month prior to application under s. 106(2) — Applicant's submission that Board ought to determine person's duties as of the date of filing of the application for certification rejected — Officer's appointment cancelled — Matter adjourned *sine die*

ROYAL MATTRESS LIMITED; RE U.F.C.W. (Dec.) 1605

Employee Reference — Interference in Trade Unions — Unfair Labour Practice — Employer purportedly promoting employee to supervisory position and paying him more than wage rates in collective agreement — Employee not exercising managerial functions and continuing to be an employee for purposes of the Act — Employer breaching ss. 64 and 67 in bargaining directly with employee with respect to his wage rate and in its attempt to circumvent the provisions of the collective agreement

REXWOOD PRODUCTS LIMITED; RE LUMBER AND SAWMILL WORKERS' UNION, LOCAL 2995 OF THE C.J.A. (Feb.) 267

Employee Reference — Office unit relatively new at time of Officer's inquiry — Board detailing its approach to managerial and confidential exclusions — Employer having onus to organize its affairs so that its employees are not occasionally placed in such position of potential conflict of interest if that result can be avoided — Distribution of labour relations functions over a large number of employees may make it hard for Board to conclude that any of the employees should be excluded

J.M. SCHNEIDER INC., LINK SERVICES INC.; RE THE SCHNEIDER-LINK OFFICE EMPLOYEES' ASSOCIATION (Mar.) 381

Employee Reference — Practice and Procedure — Agreement by parties on employee list during certification process — Whether union can bring an employee reference for an individual who was not on schedules — An agreement that a person is not within the unit, or on the schedules, is not necessarily an agreement that the person is not an employee because s/he exercises managerial functions — No agreement on employee status — Officer appointed

ROYAL MATTRESS MFG. CO.; RE U.F.C.W. (Oct.) 1302

Employee Reference — Practice and Procedure — Whether nurse clinicians in hospital excluded from unit by s. 1(3)(b) — Application date in January and officer's inquiry in September and December — Passage of time not warranting departure from Board practice of determining duties and responsibilities as of application date — Management style in health care field reviewed — Nurse clinicians not employed in a confidential capacity nor exercising managerial functions

GREY BRUCE REGIONAL HEALTH CENTRE; RE ONA (July) 996

Employee Reference — Whether persons performing a mixed job of "security guard" and clerk employed as "guards" within the meaning of the Act — Actual duties never placing persons in position of possible conflict of interest with other employees — Board finding that persons not employed as guards

KIMBERLY CLARK OF CANADA LTD.; RE LUMBER AND SAWMILL WORKERS' UNION, LOCAL 2693 (Oct.) 1255

Employee Reference — Whether yard foreman at seasonal marina performing managerial functions — Individual had been the foreman for only a short period of time when officer's

- inquiry conducted — S. 106(2) jurisprudence reviewed — Foreman found to be an employee
- WHITBY, THE TOWN OF; RE C.U.P.E. (June) 937
- Employer — Certification — Construction Industry — Membership Evidence — Practice and Procedure — Applicant refused leave to adduce evidence with respect to payment of a dollar on card which only contained signature on receipt portion — Portion of respondent's reply alleging unparticularized improprieties struck — Failure to retain legal counsel no excuse for ignorance of Board's rules — Respondent engaged in painting structures at petrochemical complexes — Painting susceptible of being categorized as either maintenance work or construction work — Painting done for purpose of sustaining existing operations classified as maintenance work — Application for certification not properly made pursuant to construction industry provisions of Act
- GALLANT PAINTING, JETTE PEDERSEN C.O.B. AS; RE P.A.T., LOCAL 1590; RE GROUP OF EMPLOYEES (Mar.) 367
- Employer — Certification — Construction Industry — Respondent providing construction project management services to owner of project — Order for casual labourers made by owner but persons put to work and paid by construction project manager — Construction project manager the employer for purposes of the Act — Certificates issuing
- ANGUS J. MACKINNON CONSULTANTS LIMITED, A.J. MACKINNON & ASSOCIATES; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL..... (Oct.) 1204
- Evidence — Adjourment — Collective Agreement — Construction Industry Grievance — Applicant's failure to file collective agreement with its referral not grounds for granting respondent an adjourment — Board entertaining applicant's evidence about what respondent said in prior s. 1(4) proceedings — Onus of proof on applicant but evidentiary burden shifting to respondent — Respondent calling no witnesses — Grievance allowed
- BROOME, TERRENCE; RE C.J.A., LOCAL 1316..... (Jan.) 13
- Evidence — Bargaining Rights — Related Employer — Non-unionized company bought by unionized company — Board relying on extrinsic evidence of past practice to determine contours of applicant's existing bargaining rights — Board exercising discretion to issue one employer declaration and declaration that non-unionized company bound by the collective agreement between the applicant and the unionized company
- MASSTRON SCALE LTD. AND TOLEDO SCALE DIVISION OF RELIANCE ELECTRIC LIMITED; RE I.A.M. (Dec.) 1578
- Evidence — Bargaining Unit — Certification — Officer conducting inquiry into duties and responsibilities of "Area Superintendents" — Union denied opportunity to call evidence on duties and responsibilities of employees engaged as "Interpreters" — Board finding that such evidence not within the scope of the officer's inquiry but arguable whether evidence respecting borderline positions can have any relevance in a determination under s. 1(3)(b) — Issue should not be the subject of a hearing until officer's inquiry completed
- GRAND RIVER CONSERVATION AUTHORITY; RE O.P.S.E.U. (Nov.) 1371
- Evidence — Certification — Construction Industry — Practice and Procedure — Challenge to officer's ruling that respondent limited to introducing evidence relating to the work of the employees on the application date — Appropriate time for dealing with such matters is after the officer's report is received — Officer directed to continue with enquiry
- STRONGLAND CONSTRUCTION LTD.; RE C.J.A., LOCAL 27 (Oct.) 1330
- Evidence — Certification — Construction Industry — Practice and Procedure — Union submitting that Board should not entertain employer's evidence on ground it was obtained in vio-

- lation of Act — Manner in which evidence obtained not a proper basis on which to exercise discretion to refuse to admit relevant evidence
- ELGIN CONSTRUCTION COMPANY LIMITED; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL; RE GROUP OF EMPLOYEES(Jan.) 45
- Evidence — Certification — Reconsideration — Balancing of interests requiring production of documents — Documents that are arguably relevant must be produced — Decision to produce documents confirmed
- MOLLENHAUER LIMITED; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183; RE M.T.A.B.A.; RE ELLIS-DON LIMITED; RE THE FORM WORK COUNCIL OF ONTARIO; RE MILNE & NICHOLLS LTD. (Oct.) 1294
- Evidence — Charter of Rights and Freedoms — Construction Industry Grievance — Practice and Procedure — Respondent objecting to lack of particularity in grievance — Any evidence relevant to issue of violation of collective agreement admissible whether or not specific instances have been particularized — Board determining procedure to be followed in entertaining Charter argument in this case
- ARLINGTON CRANE SERVICE LIMITED; RE I.U.O.E., LOCAL 793; RE OPERATING ENGINEERS EMPLOYER BARGAINING AGENCY(Jan.) 7
- Evidence — Jurisdictional Dispute — Sector Determination — Whether Board should hear evidence of area practice in making sectoral determination under s. 150 — Legislature never intended to introduce concept of area practice or geographic area into sectoral determination — Labour relations best served by not making distinctions among the trades in sectoral determinations — Further hearing set to hear evidence of the work characteristics of the work in dispute
- ARMBRO MATERIALS AND CONSTRUCTION LIMITED, AND L.I.U.N.A., LOCAL 183; RE U.A., LOCAL 599; RE I.U.O.E., LOCAL 793; RE METROPOLITAN TORONTO SEWER AND WATERMAIN CONTRACTORS ASSOCIATION (July) 948
- Evidence — Practice and Procedure — Respondent objecting to the scope of a summons on the basis that the documents required are irrelevant — Law on production of documents through a summons reviewed — Order to bring documents to next hearing
- MOLLENHAUER LIMITED; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183; RE MTABA; RE ELLIS-DON LIMITED; RE THE FORMWORK COUNCIL OF ONTARIO; RE MILNE & NICHOLLS LTD. (Sept.) 1156
- Financial Statement — Reconsideration — Settlement — Financial statements prepared by certified general accountant provided to complainant pursuant to minutes of settlement — Complainant attempting to “re-open” complaint on the basis that statements must be prepared by a chartered accountant — Audited financial statement need not be prepared by a person licensed under the *Public Accountancy Act* unless Board so directs — Party not permitted to resile from settlement — Request to reconsider complaint rejected
- HOOSAIN, TONY; RE DISTRICT COUNCIL C.J.A.; RE C.J.A., LOCAL 27 (Dec.) 1513
- First Contract Arbitration — COMSOC providing funding to respondent non-profit juvenile home — Union submitting that bargaining impasse resulted from COMSOC’s unwillingness to increase funds for wages — Board unable to find that bargaining had been unsuccessful — Room available for further discussion, clarification and compromise — Application dismissed
- JUVENILE DETENTION (NIAGARA) INC.; RE O.P.S.E.U.(Jan.) 66
- First Contract Arbitration — Employer refusing to agree to just cause clause in collective agreement — Union engaging in unsuccessful strike — Bad faith bargaining complaint by union

- dismissed — Whether employer's position was without reasonable justification — Board assessing whether proposal was reasonable in objective terms — Section 40a requiring a departure from bad faith bargaining jurisprudence — Settlement of first contract directed
 FORMULA PLASTICS INC.; RE U.F.C.W. (May) 702
- First Contract Arbitration — History of employer unfair labour practices — Employer threatening plant closure — Employer refusing to bargain until employees given a representation vote — Refusal to recognize the bargaining authority of the union forming basis for directing the settlement of a first collective agreement by arbitration
 WALTER TOOL AND DIE LTD.; RE U.S.W.A. (May) 793
- First Contract Arbitration — Practice and Procedure — Termination — Termination application filed the day before the Board issued a decision directing settlement of a first contract by arbitration — Application ought to be considered subsequent to the application for a direction on the ground that the panel seized with the first contract application had nearly completed its hearing of that application — Since first contract application granted, Board required to dismiss termination application
 CO-FO CONCRETE FORMING CONSTRUCTION LIMITED; RE JORGE SILVA;
 RE L.I.U.N.A., LOCAL 1059 (June) 828
- First Contract Arbitration — Union certified pursuant to s. 8 following employer unfair labour practices — Employer refusing to provide the union, when requested, with the names, addresses, telephone numbers and hourly rates of the employees in the unit — Employer resisting a union security clause for more than 15 months — Failure of communication between employer's representative at the bargaining table and the decision-maker who was not at the table — Process of collective bargaining unsuccessful for reasons set out in s. 40a(2)(a), (b) and (c) — Direction to settle first collective agreement by arbitration
 CO-FO CONCRETE FORMING CONSTRUCTION LIMITED; RE L.I.U.N.A.,
 LOCAL 1059..... (Oct.) 1213
- First Contract Arbitration — Union unable to reach collective agreement with financially troubled private boarding school — Whether school had adopted an uncompromising bargaining position regarding management rights, seniority, layoffs, and related issues — School attempting to bring itself into line with its competitors — Application dismissed
 ALMA COLLEGE; RE O.S.S.T.F. (Dec.) 1453
- Fraud — Certification — Pre-Hearing Vote — Reconsideration — CPU certified following two-way vote — Intervening union claiming forged letter containing legal opinion distributed to employees prior to vote — Whether Board should revoke certificate for fraud or reconsider its decision to certify
 GREAT WEST TIMBER LIMITED; RE C.P.U.; RE LUMBER AND SAWMILL
 WORKERS UNION, LOCAL 2693 OF C.J.A. (Jan.) 51
- Fraud — Termination — Applicants alleging that employees intimidated into signing membership cards during organizing drive — Allegations not constituting fraud — Meaning of fraud should not be expanded to include charges which can be filed under other sections of the Act — Application dismissed
 EASY ENTERPRISES INC.; RE CHARLENE BANWAIT; RE LAUNDRY AND
 LINEN DRIVERS AND INDUSTRIAL WORKERS UNION, TEAMSTERS UNION
 LOCAL 847 (July) 994
- Health and Safety — Complainant fired for refusing to clean washroom — Complainant reinstated pursuant to settlement with seniority but without compensation — Two months after reinstatement complainant filing complaint under OHSA in order to recover lost earnings

— Complaint dismissed — Complainant had agreed to a resolution of his grievance in another forum — Board exercising discretion not to inquire into complaint

GREAT ATLANTIC & PACIFIC COMPANY OF CANADA, LIMITED; RE GLEN CULLEN; RE R.W.D.S.U., LOCAL 414; RE MR. PETER CLEARY, ET AL. (May)

714

Health and safety — Discharge — Complainants alleging that respondent discharged them to prevent them from raising further safety problems — Employer maintaining the discharges resulted from the complainants disrupting the workplace and refusing to do their regular work — Complainants were not authorized health and safety representatives but were doing safety inspections on company time — OHSA not authorizing employees to act as self-appointed safety representatives — Employees not terminated because they were exercising rights under OHSA — Five-day suspension substituted for two of three discharges

COMMONWEALTH CONSTRUCTION COMPANY, A DIVISION OF GUY F. ATKINSON LTD.; RE RALPH MARION ET AL. (July)

961

Health and Safety — Employee sent home from work and later suspended following work refusal — Employee refusing to meet with member of health and safety committee and to state reason why she considered work to be unsafe — Employee's conduct resulting in employee herself breaching the Act — Employee had a real personal concern about the safety of working the automotive parts line — Failure to assign employee to reasonable alternative work contrary to Act — Suspension reduced

NORTH AMERICAN PLASTICS COMPANY LIMITED, PETER WALKER, ET AL.; RE MARIE V. ROY (Feb.)

251

Health and Safety — Practice and Procedure — Unfair Labour Practice — Complainant's advisor refused admittance to respondent's property for the purpose of a view — Board having authority to order view and determine who should attend — Whether press should be excluded from hearing room or prohibited from publishing any evidence until the end of the case

STEEL COMPANY OF CANADA, INC.; RE BONITA CLARK; RE THE TORONTO STAR, THE HAMILTON SPECTATOR AND THE GLOBE & MAIL; RE U.S.W.A., LOCAL 1005 (Jan.)

126

Interference in Trade Unions — Certification — Intimidation and Coercion — Petition — Unfair Labour Practice — Three employees called individually into management's office and questioned about union organizing drive — Board concluding most employees would have become aware of interviews and their contents — Bonus cheques given to employees — Scheme of payment of first-time bonuses during one-to-one meetings with employees designed to exert pressure on employees to oppose the union — Exertion of pressure and undue influence breach of Act — Petition not voluntary — Union certified and posting ordered

HAYLOFT STEAKHOUSE LIMITED; RE U.F.C.W., LOCAL 175; RE GROUP OF EMPLOYEES (May)

717

Interference in Trade Unions — Certification Where Act Contravened — Unfair Labour Practice — Letter sent by president of respondent suggesting link between unionization and possible loss of jobs going beyond boundaries of freedom of speech — Lead hands not excluded from bargaining unit but acting on behalf of management in violation of sections 64 and 66 — Lay-offs partly motivated by anti-union animus — Employer involvement in employee association designed to diminish appeal of a union violation of Act — Union certified pursuant to section 8

CAMBRIDGE CANADIAN FOODS INC; RE U.F.C.W., LOCAL 1000A; RE GROUP OF EMPLOYEES (Mar.)

319

- Interference in Trade Unions — Change in Working Conditions — Intimidation and Coercion — Remedies — Unfair Labour Practice — Fishing boat captain and crew laid off at height of fishing season during an organizing drive — Removal of licences from boat, denying grievors an opportunity to fish, and failing to pay captain's bonus constituting a breach of the Act — Order directing respondent company to resume its fishing operations and reinstate grievors inappropriate — Compensation awarded for one fishing season — President of corporate respondent personally liable
- PERALTA FOODS — ILDA C., 538391 ONTARIO LIMITED C.O.B. AS, AND VITO PERALTA; RE GREAT LAKES FISHERMEN AND ALLIED WORKERS' UNION..... (Sept.) 1162
- Interference in Trade Unions — Change in Working Conditions — Intimidation and Coercion — Remedies — Unfair Labour Practice — Unprecedented six-week layoff, withholding of vacation pay and cancellation of summer hours constituting unfair labour practices — Each party required to set out in writing and in detail a complete statement of its position on compensation issue if parties unable to agree on amount of compensation to be paid grievors
- UMFREVILLE DISTRICT SCHOOL AREA BOARD; RE C.U.P.E..... (Mar.) 434
- Interference in Trade Unions — Duty to Bargain in Good Faith — Remedies — Unfair Labour Practice — Employer failing to meet with union to bargain within 15 day period — Employer engaging in course of conduct intended to thwart any meaningful bargaining — Conduct viewed in context of massive unfair labour practices during organizing drive — Breach of duty to bargain in good faith — Attendance of member of management at union meeting contravening ss. 64 and 70 — Employer directed to prepare a collective agreement it is prepared to sign to be presented to union at a meeting with a mediator
- MOREWOOD INDUSTRIES LIMITED; RE C.J.A., GENERAL WORKERS' UNION, LOCAL 1030..... (Jan.) 92
- Interference in Trade Unions — Employee Reference — Unfair Labour Practice — Employer purportedly promoting employee to supervisory position and paying him more than wage rates in collective agreement — Employee not exercising managerial functions and continuing to be an employee for purposes of the Act — Employer breaching ss. 64 and 67 in bargaining directly with employee with regard to his wage rate and in its attempt to circumvent the provisions of the collective agreement
- REXWOOD PRODUCTS LIMITED; RE LUMBER AND SAWMILL WORKERS' UNION, LOCAL 2995 OF THE C.J.A..... (Feb.) 267
- Interference in Trade Unions — Unfair Labour Practice — Employees of ambulance service asked by Ministry of Health to participate in pilot para-medical program by taking a leave of absence — Participants asked to sign leave renewal agreements on same terms and conditions when program extended — Whether employer bargaining directly with employees — Conditions of work outside the scope of the collective agreement from which the union derived its bargaining rights — No bargaining directly with employees — Complaint dismissed
- SUPERIOR AMBULANCE LIMITED, R.J. ARMSTRONG AND AL ERLBUSCH; RE O.P.S.E.U..... (May) 772
- Intimidation and Coercion — Certification — Interference in Trade Unions — Petition — Unfair Labour Practice — Three employees called individually into management's office and questioned about union organizing drive — Board concluding most employees would have become aware of interviews and their contents — Bonus cheques given to employees — Scheme of payment of first-time bonuses during one-to-one meetings with employees designed to exert pressure on employees to oppose the union — Exertion of pressure and

undue influence breach of Act — Petition not voluntary — Union certified and posting ordered	
HAYLOFT STEAKHOUSE LIMITED; RE U.F.C.W., LOCAL 175; RE GROUP OF EMPLOYEES..... (May)	717
Intimidation and Coercion — Change in Working Conditions — Interference in Trade Unions — Remedies — Unfair Labour Practice — Fishing boat captain and crew laid off at height of fishing season during an organizing drive — Removal of licences from boat, denying grievors an opportunity to fish, and failing to pay captain's bonus constituting a breach of the Act — Order directing respondent company to resume its fishing operations and reinstate grievors inappropriate — Compensation awarded for one fishing season — President of corporate respondent personally liable	
PERALTA FOODS — ILDA C., 538391 ONTARIO LIMITED C.O.B. AS, AND VITO PERALTA; RE GREAT LAKES FISHERMEN AND ALLIED WORKERS' UNION..... (Sept.)	1162
Intimidation and Coercion — Change in Working Conditions — Interference in Trade Unions — Remedies — Unfair Labour Practice — Unprecedented six-week layoff, withholding of vacation pay and cancellation of summer hours constituting unfair labour practices — Each party required to set out in writing and in detail a complete statement of its position on compensation issue if parties unable to agree on amount of compensation to be paid grievors	
UMFREVILLE DISTRICT SCHOOL AREA BOARD; RE C.U.P.E.....(Mar.)	434
Intimidation and Coercion — Consent to Prosecute — Unfair Labour Practice — Witness — Employer alleging respondents misled an arbitrator and intimidated a witness — Complaint found to be an abuse of the Board's process to gain a tactical advantage in respect of other pending complaints — No prima facie case	
FITZHENRY AND WHITESIDE LIMITED; RE. T.T.U., LOCAL 91 AND NELSON ROLAND (Apr.)	504
Intimidation and Coercion — Construction Industry — Duty of Fair Representation — Ratification and Strike Vote — Unfair Labour Practice — Manner in which local union meetings conducted not prima facie breach of fair representation duty — Political differences in union local insufficient to indicate intimidation and coercion — Complaint with respect to entitlement to vote in I.C.I. sector strike vote must be made to Minister under s. 149a and not to Board under s. 72(5) — Complaint dismissed as disclosing no prima facie case with respect to any of the pleaded sections of the Act	
CONNOLLY, MICHAEL AND UCAL POWELL; RE C.J.A., LOCAL 27 (Feb.)	193
Intimidation and Coercion — Duty of Fair Referral — Duty of Fair Representation — Unfair Labour Practice — Union revoking permission granted complainants to work at Hydro — Complainants refusing to pay fines imposed for continuing to work — Union refusing to refer complainants out of hiring hall — Complaint of unfair labour practices dismissed	
CRADDOCK, JOHN, ET AL.; RE U.A., LOCAL 527..... (Dec.)	1488
Intimidation and Coercion — Remedies — Unfair Labour Practice — Labourers' Union representative making statement to carpenters performing concrete forming on residential job site that they must join the Labourers' Union to continue working on the job — Conduct amounting to intimidation and coercion in circumstances — Labourers' Union jointly responsible with employer for the damages arising from carpenters being removed from job site	
LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 527, ANDRE ROY AND; RE C.J.A., LOCAL 93..... (Apr.)	523

- Jurisdictional Dispute — Collective agreements requiring work assignment disputes be referred to a common tribunal — Respondents contending Board having no jurisdiction to entertain complaint — Whether clauses in agreements rendered nugatory when disputes tribunal ceased to exist — Board concluding it has no jurisdiction to entertain complaint
- ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION, ONTARIO HYDRO, B.S.O.I.W., LOCAL 721 AND B.B.F., LOCAL 128; RE ONTARIO SHEET METAL WORKERS' CONFERENCE AND S.M.W., LOCAL NO. 30 (Apr.) 487
- Jurisdictional Dispute — Construction Industry — Practice and Procedure — Sector Determination — Work dispute concerning the installation of storm sewers and catch basins — Whether merits of dispute should be deferred until Board determines into which sector of the construction industry the work in dispute falls
- STEEN CONTRACTORS LIMITED, L.I.U.N.A., LOCAL 597 AND; RE U.A., LOCAL 463; RE MILNE AND NICHOLLS/VANBOTS JOINT VENTURE (Jan.) 137
- Jurisdictional Dispute — Construction Industry — Work assignment dispute involving representation issue as to whether carpenters' or labourers' union will represent carpenters engaged in house framing carpentry in low-rise residential construction — Board exercising its discretion to hear jurisdictional dispute despite fact that representation issue involved — Representation issue merely going to merits of work assignment dispute and to the form of remedy
- TRIMAR CONSTRUCTION, L.I.U.N.A., LOCAL 183, LAKEVIEW ESTATES LTD., 529126 ONTARIO INC. C.O.B. AS; RE C.J.A., LOCAL 1190; RE TORONTO HOUSING LABOUR BUREAU (Apr.) 632
- Jurisdictional Dispute — Construction Industry Grievance — Parties — Work assignment dispute underlying cause of grievance — Whether Board should decide in a grievance the correctness of a work assignment to members of a trade union other than the trade union which is one of the parties to the grievance — Whether the other trade union should be made a party to the referral for the limited purpose of deciding the correctness of the assignment — Board declining to adjudicate the work assignment dispute in the context of a grievance proceeding — Board refusing to make other union a party to the grievance proceeding
- COPPER CLIFF MECHANICAL CONTRACTORS LTD.; RE MILLWRIGHT DISTRICT COUNCIL ON BEHALF OF LOCAL 1425; RE IRONWORKERS DISTRICT COUNCIL, B.S.O.I.W., LOCAL 786 (Nov.) 1357
- Jurisdictional Dispute — Evidence — Sector Determination — Whether Board should hear evidence of area practice in making sectoral determination under s. 150 — Legislature never intended to introduce concept of area practice or geographic area into sectoral determination — Labour relations best served by not making distinctions among the trades in sectoral determinations — Further hearing set to hear evidence of the work characteristics of the work in dispute
- ARMBRO MATERIALS AND CONSTRUCTION LIMITED, AND L.I.U.N.A., LOCAL 183; RE U.A., LOCAL 599; RE I.U.O.E., LOCAL 793; RE METROPOLITAN TORONTO SEWER AND WATERMAIN CONTRACTORS ASSOCIATION (July) 948
- Jurisdictional Dispute — Practice and Procedure — Applicant seeking only a direction for educational purposes and not an assignment of work — No labour relations purpose served by the Board entering into an inquiry for the sole purpose of declaring whether the work was properly assigned — Complaint dismissed
- MAGNA INTERNATIONAL INC., COSMA, A DIVISION OF, MILLWRIGHTS UNLIMITED, ASSOCIATION OF MILLWRIGHTING CONTRACTORS OF ONTARIO INC., C.J.A., LOCAL 1916, M.C.A.O.; RE ONTARIO PIPE TRADES COUNCIL OF THE U.A. AND U.A., LOCAL 67 (May) 742

Jurisdictional Dispute — Practice and Procedure — Whether Board should entertain second complaint when first complaint dismissed for failure of complainants to appear at hearing — Subject matter of second complaint identical — Board unwilling to bar complaint as being *res judicata* — Having regard to the fact that it was by the complainant's inadvertence that the chance to adjudicate the original complaint on its merits was lost, Board exercising its discretion to not entertain second complaint

CATALYTIC MAINTENANCE INC., PETRO-CANADA PRODUCTS, A DIVISION OF PETRO-CANADA INC., AND E.C.W.U., LOCAL 593; RE U.A., LOCAL 46.....(Nov.)

1353

Membership Evidence — Certification — Construction Industry — Employer — Practice and Procedure — Applicant refused leave to adduce evidence with respect to payment of a dollar on card which only contained signature on receipt portion — Portion of respondent's reply alleging unparticularized improprieties struck — Failure to retain legal counsel no excuse for ignorance of Board's rules — Respondent engaged in painting structures at petrochemical complexes — Painting susceptible of being categorized as either maintenance work or construction work — Painting done for purpose of sustaining existing operations classified as maintenance work — Application for certification not properly made pursuant to construction industry provisions of Act

GALLANT PAINTING, JETTE PEDERSEN C.O.B. AS; RE P.A.T., LOCAL 1590; RE GROUP OF EMPLOYEES(Mar.)

367

Membership Evidence — Certification — Construction Industry — Petition — Inexperienced union organizer "loaning" dollar to two employees when they signed membership cards — Loans not disclosed on Form 80 — History of how Board has dealt with non-pay problems reviewed — No intention to repay money — Loans not bona fide — Failure to disclose loans on declaration causing Board to disregard remainder of membership cards filed despite inexperience of union organizer — Certification dismissed

BELAIR RESTORATION (ONTARIO) INC.; RE O.P.C.M., LOCAL 172; RE GROUP OF EMPLOYEES.....(Feb.)

183

Membership Evidence — Certification — Employee objectors submitting that 55.3 percent membership support not "more than 55 percent" as described in s. 7(2) — Board treating any fraction of a percentage over 55 as sufficient for automatic certification — Board declining to direct a representation vote — Certificate issuing

ALL TYPE METAL STAMPING LIMITED; RE TEAMSTERS' UNION, LOCAL 879; RE GROUP OF EMPLOYEES(Feb.)

181

Membership Evidence — Certification — Form 80 rejected in earlier certification application because proper inquiries had not been made by the Form 80 declarant — New Form 80's filed in this application — No grounds for barring this application — Earlier decision *res judicata* only with respect to the earlier Form 80 — Board prepared to rely on the evidence of membership and the new Form 80's — Certificates issuing

COUNTY ELECTRIC OF PETERBOROUGH LIMITED; RE I.B.E.W., LOCAL 894; RE GROUP OF EMPLOYEES(Dec.)

1485

Membership Evidence — Certification — Parties — Form of evidence acceptable to Board when considering intervener status — Labourers' Union claiming intervener status on the ground that it represented employees in the unit — One of the employees for whom evidence was filed was on the employer's list and represented by the Union when the hearing began — Labourers' Union having status to intervene

LES INGENIERIES CONSBEC INC.; RE I.U.O.E., LOCAL 796; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL, L.I.U.N.A., LOCAL 607(Nov.)

1402

- Membership Evidence — Certification — Practice and Procedure — Earlier decision varied — Respondent not permitted to add further name to employee list when list already amended three times — Incomplete dates on membership cards cured by *viva voce* evidence — Possible ambiguity in documentary evidence concerning whether application one for membership in local or international not fatal because, as a whole, the evidence points unequivocally to membership in the applicant — Certificates issuing
- MENKES DEVELOPMENTS INC.; RE L.I.U.N.A., LOCAL 506; RE L.I.U.N.A., LOCAL 183 (Oct.) 1290
- Membership Evidence — Certification — Practice and Procedure — Parties executing minutes of settlement agreeing on all points except whether the Board should count membership cards signed by individuals after their last day worked — Parties' request for a hearing to make argument on that issue denied — No facts in dispute — More appropriate to receive written submissions
- CATALYTIC MAINTENANCE INC.; RE L.I.U.N.A., LOCAL 1089..... (Dec.) 1479
- Membership Evidence — Certification — Practice and Procedure — Pre-Hearing Vote — Two certification applications consolidated under s. 103(3) and pre-hearing vote ordered — Intervener's argument that the date under s. 9(4) for determining its actual level of membership support should be its actual intervention/application date and not the deemed application date under s. 103 rejected — Intervener's certification application dismissed due to insufficient membership support — New "union/no union" vote ordered
- NORTH YORK, BOARD OF EDUCATION FOR THE CITY OF; RE O.P.S.E.U.; RE O.S.S.T.F. (Jan.) 116
- Membership Evidence — Certification — Practice and Procedure — Witness — Two non-pay allegations made by respondent — Credibility of collector in issue — Evidence concerning criminal convictions of two witnesses admissible — Collector not in charge of organizing campaign found to have collected two cards without proper payment — All evidence secured by that collector rejected — Lack of credibility of another witness not destroying evidentiary value of membership he collected
- OLYMPIA FLOOR & WALL TILE COMPANY, OLYMPIA & YORK DEVELOPMENTS LIMITED, C.O.B. AS; RE L.I.U.N.A., LOCAL 183; RE GROUP OF EMPLOYEES (May) 762
- Parties — Bargaining Rights — Certification — Construction Industry — Practice and Procedure — Employer seeking to resile from agreement on employee list and revert to earlier position — Inappropriate for Board to permit employer to resile — Labourers' Union seeking to intervene in carpenters application on the basis that it represented all construction employees of the employer pursuant to a collective agreement between it and the Housing Labour Bureau — Labourers' Union denied intervener status on basis of collective agreement which does not cover carpenters — Labourers' Union granted status to intervene based on membership evidence submitted on date of hearing — Labour relations officer appointed
- RUNNYMEDE DEVELOPMENT CORPORATION LIMITED; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183..... (Oct.) 1305
- Parties — Certification — Membership Evidence — Form of evidence acceptable to Board when considering intervener status — Labourers' Union claiming intervener status on the ground that it represented employees in the unit — One of the employees for whom evidence was filed was on the employer's list and represented by the Union when the hearing began — Labourers' Union having status to intervene
- LES INGENIERIES CONSBEC INC.; RE I.U.O.E., LOCAL 796; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL, L.I.U.N.A., LOCAL 607 (Nov.) 1402

Parties — Certification — Practice and Procedure — Applicant requesting hearing to determine status of intervener prior to officer examinations — Issues of law to be dealt with after officer has reported to Board — Officer ordered to continue with enquiry

HOLLINGWORTH DRAIN SERVICES; RE C.J.A., LOCAL 27 (Oct.) 1250

Parties — Change in Working Conditions — Unfair Labour Practice — Individual employee not having standing to allege breach of statutory freeze

BLUE LINE TAXI LTD.; RE GREGORY BARRETT; RE THE CORPORATION OF THE CITY OF OTTAWA (Apr.) 470

Parties — Construction Industry Grievance — Jurisdictional Dispute — Work assignment dispute underlying cause of grievance — Whether Board should decide in a grievance the correctness of a work assignment to members of a trade union other than the trade union which is one of the parties to the grievance — Whether the Other trade union should be made party to the referral for the limited purpose of deciding the correctness of the assignment — Board declining to adjudicate the work assignment dispute in the context of a grievance proceeding — Board refusing to make other union a party to the grievance proceeding

COPPER CLIFF MECHANICAL CONTRACTORS LTD.; RE MILLWRIGHT DISTRICT COUNCIL ON BEHALF OF LOCAL 1425; RE IRONWORKERS DISTRICT COUNCIL, B.S.O.I.W., LOCAL 786 (Nov.) 1357

Parties — Petition — Termination — Whether petitions should be rejected because they do not specifically identify the locals of the Union affected by the application — Whether applicant can seek termination of bargaining rights in respect of three units when he is a member of only one unit — Local designation not significant to employees signing petitions — Employees found to have authorized applicant to file termination application on their behalf — Vote ordered

HUNTSVILLE I.G.A.; RE CECIL DEHAAN; RE U.F.C.W., LOCALS 633 AND 175 (Dec.) 1517

Parties — Right of Access — Incumbent union allowed to intervene in raiding union's access application — Board reviewing access jurisprudence — Access section not intended to apply only to geographically remote work sites — Access ordered on terms

GREAT LAKES FOREST PRODUCTS LTD. (LAKEHEAD WOODLANDS DIVISION); RE I.W.A. CANADIAN REGIONAL COUNCIL NO. 1; RE C.P.U.; RE LUMBER AND SAWMILL WORKERS' UNION (Sept.) 1136

Parties — Right of Access — Raiding union seeking access order — Incumbent union seeking to intervene to oppose order — Access order not infringing any legal rights or interests of incumbent union — Intervener status denied

DOMTAR INC.; RE C.P.U. (Apr.) 485

Petition — Certification — Construction Industry — Document bearing foreman's signature and signed at the request of the foreman not a voluntary statement of desire — Certificates issuing

THORNTON SAND & GRAVEL LIMITED; RE L.I.U.N.A., LOCAL 1059; RE GROUP OF EMPLOYEES (Oct.) 1331

Petition — Certification — Construction industry — Membership Evidence — Inexperienced union organizer "loaning" dollar to two employees when they signed membership cards — Loans not disclosed on Form 80 — History of how Board has dealt with non-pay problems reviewed — No intention to repay money — Loans not bona fide — Failure to disclose

loans on declaration causing Board to disregard remainder of membership cards filed despite inexperience of union organizer — Certification dismissed

BELAIR RESTORATION (ONTARIO) INC.; RE O.P.C.M., LOCAL 172; RE GROUP OF EMPLOYEES (Feb.) 183

Petition — Certification — Construction Industry — Representation Vote — Employee absent from work on application date due to injury not included in unit for purposes of the count — Petition found to be voluntary despite fact that petitioner retained same lawyer that represented the employer — Operation of employer suspended during winter season — Vote postponed until employees are employed in the unit

A. VUKOVIC FORMING CO., ANTON VUKOVIC C.O.B. AS; RE L.I.U.N.A., LOCAL 527; RE RICHARD LOOP (Mar.) 311

Petition — Certification — Construction Industry — Working foreman not actively participating in petition's origination and circulation but signing it and present throughout process — Working foreman perceived as being managerial — Petition rejected — Applicant certified

BURL-OAK PAVING LTD.; RE L.I.U.N.A., LOCAL 183; RE GROUP OF EMPLOYEES (Apr.) 474

Petition — Certification — Gap in evidence with respect to physical custody of petition — Failure to adduce direct evidence as to what happened to the petition constituting a material gap in the evidence required to discharge the onus of proving the voluntariness of the petition — Petition given no weight — Certificate issuing

CANADA DRY BOTTLING COMPANY LTD.; RE U.F.C.W.; RE GROUP OF EMPLOYEES (Mar.) 337

Petition — Certification — Interference in Trade Unions — Intimidation and Coercion — Unfair Labour Practice — Three employees called individually into management's office and questioned about union organizing drive — Board concluding most employees would have become aware of interviews and their contents — Bonus cheques given to employees — Scheme of payment of first-time bonuses during one-to-one meetings with employees designed to exert pressure on employees to oppose the union — Exertion of pressure and undue influence breach of Act — Petition not voluntary — Union certified and posting ordered

HAYLOFT STEAKHOUSE LIMITED; RE U.F.C.W., LOCAL 175; RE GROUP OF EMPLOYEES (May) 717

Petition — Certification — Opposition to certification application consisting of the leadership of a pre-existing employee association which had "negotiated" two "contracts" with the employer — Petition found to be voluntary despite fact that petitioners were lead hands, familial relationships with management existed, and association meetings were held on company premises — Long-standing polarization of employees as to unionization key factor in assessment of voluntariness — Vote ordered

ELGIN HANDLES LIMITED; RE TEAMSTERS' UNION, LOCAL NO. 141; RE GROUP OF EMPLOYEES (Apr.) 496

Petition — Certification — Practice and Procedure — Petition filed after terminal date by employee who mistakenly believed he was not in the bargaining unit — Description of unit not amended subsequent to posting — Request to extend terminal date denied — Employees had reasonable notice of proceedings — Employer misleading employee as to his status not sufficient grounds to extend terminal date — Petition untimely

WE'RE ECONOPRINT FAST, 570662 ONTARIO LIMITED C.O.B. AS; RE ST. CATHARINES TYPOGRAPHICAL UNION NO. 416 (Mar.) 440

- Petition — Parties — Termination — Whether petitions should be rejected because they do not specifically identify the locals of the union affected by the application — Whether applicant can seek termination of bargaining rights in respect of three units when he is a member of only one unit — Local designation not significant to employees signing petitions — Employees found to have authorized applicant to file termination application on their behalf — Vote ordered
- HUNTSVILLE I.G.A.; RE CECIL DEHAAN; RE U.F.C.W., LOCALS 633 AND 175 (Dec.) 1517
- Petition — Termination — All employees laid off shortly after certification — Breach of sections 70 and 79 but not 64 and 66 — Applicant receiving guidance on petition from previously employed superintendent — Majority finding petition voluntary — Board discussing distinction between a petition in a certification application and a petition in a termination application — Vote ordered
- HURON STEEL FABRICATORS (LONDON) LIMITED; RE PAUL PETRUS; RE C.J.A., LOCAL 3054 (Dec.) 1522
- Petition — Termination — Certification application withdrawn when settlement reached that employer would voluntarily recognize the union — Termination application brought under s. 60 by one of the petitioners in the certification application — Whether petition initially filed in the certification application can be raised by the applicant as relevant to whether or not the union was entitled to represent the employees in the unit at the time of voluntary recognition — Petition not relevant in this application — Application dismissed
- MARKS, EUGENE; RE U.F.C.W., LOCAL 617 (June) 872
- Petition — Termination — Counterpetition reducing support for termination application below 45 percent — Applicant challenging Board's jurisdiction to give effect to counterpetition in deciding whether to order a vote in a termination application — Purposive interpretation of s. 57(3) adopted — Termination application dismissed
- T. EATON COMPANY LIMITED; RE R.W.D.S.U.; RE ALEX NIGRO (Jan.) 166
- Petition — Termination — Employer giving wage increases to employees in its non-unionized stores but not to employees covered by collective agreements — Purpose of increase not the origination of termination applications — Supporters of petitions including department section heads — Employees not perceiving section heads as agents of management — Petitions found voluntary — Representation votes ordered
- T. EATON COMPANY LIMITED; RE R.W.D.S.U.; RE VAL MCKEAN, ET AL. (Jan.) 141
- Petition — Termination — First termination application withdrawn — Inquiry into voluntariness of second petition must include consideration of circumstances surrounding first petition — Originator of petition stepping beyond bounds of permissible salesmanship — Employees perceiving originator as linked with management — Application dismissed
- IMPERIAL CLEVITE CANADA INC.; RE BERNARD JOHN MOORE; RE I.A.M., LOCAL 1975; RE GROUP OF EMPLOYEES (Mar.) 375
- Petition — Termination — Supervisor becoming member of bargaining unit — Supervisor originating and circulating petition — All of the employees he formerly supervised signing the petition — Identification with management casting doubt on voluntariness of petition — Application dismissed
- JOHNSON MATTHEY LIMITED, REMBRANDT JEWELRY MANUFACTURING, A DIVISION OF; RE BRUNO FIORINI; RE U.S.W.A., DISTRICT #6 (Apr.) 518
- Practice and Procedure — Adjournment — Construction Industry Grievance — No one appear-

ing at hearing on behalf of respondent and matter proceeding — Board's attention drawn day after hearing to telex received morning of hearing from respondent stating he would like the hearing re-scheduled — Board's practice on adjournments reviewed — Adjournment would not have been granted on the basis of the telex message in any event — Non-union hire contrary to collective agreement — Compensation awarded

CATALYST TECHNOLOGY (CANADA) LTD.; RE B.B.F., LODGE 128..... (June) 803

Practice and Procedure — Arbitration — Duty of Fair Representation — Remedies — Unfair Labour Practice — Direction to arbitration inappropriate remedy for union's breach of fair representation duty when dispute between union and complainant — Board hearing merits of grievance — Rules applicable to court proceedings used to calculate interest on lost wages — Costs denied

LECUYER, GERALD, ET AL.; RE C.P.U., LOCAL 132 AND C.P.U.; RE ABITIBI-PRICE INC. (Apr.) 529

Practice and Procedure — Bargaining Rights — Certification — Construction Industry — Parties — Employer seeking to resile from agreement on employee lists and revert to earlier position — Inappropriate for Board to permit employer to resile — Labourers' Union seeking to intervene in carpenters application on the basis that it represented all construction employees of the employer pursuant to a collective agreement between it and the Housing Labour Bureau — Labourers' Union denied intervener status on basis of collective agreement which does not cover carpenters — Labourers' Union granted status to intervene based on membership evidence submitted on date of hearing — Labour relations officer appointed

RUNNYMEDE DEVELOPMENT CORPORATION LIMITED; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183..... (Oct.) 1305

Practice and Procedure — Bargaining Unit — Certification — Employer alleging that one-third of employees should be excluded from bargaining unit by operation of s. 1(3)(b) — Exclusions sought by employer appearing to be at variance with Board jurisprudence — Examination process for large group of employees time consuming and expensive — Employer directed to file statement elaborating on job functions which would warrant a s. 1(3)(b) exclusion

CATERPILLAR OF CANADA LTD.; RE C.A.W.; RE GROUP OF EMPLOYEES (Feb.) 192

Practice and Procedure — Bargaining Unit — Certification — Whether Administration Officers and Assistant Branch Managers of trust company exercise managerial functions — Administration Officer Trainees excluded from unit on community of interest grounds — Original panel of Board not seized with remaining issues — Board reviewing its policy concerning the jurisdiction of any panel to consider outstanding issues in certification applications

NATIONAL TRUST; RE UNION OF BANK EMPLOYEES (ONTARIO), LOCAL 2104, C.L.C.; RE GROUP OF EMPLOYEES (Jan.) 108

Practice and Procedure — Certification — Construction Industry — Application for certification brought under construction industry provisions — Construction industry provisions subsequently found to not be applicable — Employer alleging that procedural fairness required that application be dismissed — Board following its practice of treating the application as though it had been made under the general provisions

GALLANT PAINTING, JETTE PEDERSEN C.O.B. AS; RE P.A.T., LOCAL 1590; RE GROUP OF EMPLOYEES (Mar.) 372

Practice and Procedure — Certification — Construction Industry — Employer — Membership Evidence — Applicant refused leave to adduce evidence with respect to payment of a dollar on card which only contained signature on receipt portion — Portion of respondent's reply

alleging unparticularized improprieties struck — Failure to retain legal counsel no excuse for ignorance of Board's rules — Respondent engaged in painting structures at petrochemical complexes — Painting susceptible of being categorized as either maintenance work or construction work — Painting done for purpose of sustaining existing operations classified as maintenance work — Application for certification not properly made pursuant to construction industry provisions of Act

GALLANT PAINTING, JETTE PEDERSEN C.O.B. AS; RE P.A.T., LOCAL 1590; RE GROUP OF EMPLOYEES (Mar.)

367

Practice and Procedure — Certification — Construction Industry — Evidence — Challenge to officer's ruling that respondent limited to introducing evidence relating to the work of the employees on the application date — Appropriate time for dealing with such matters is after the officer's report is received — Officer directed to continue with enquiry

STRONGLAND CONSTRUCTION LTD.; RE C.J.A., LOCAL 27 (Oct.)

1330

Practice and Procedure — Certification — Construction Industry — Evidence — Union submitting that Board should not entertain employer's evidence on ground it was obtained in violation of Act — Manner in which evidence obtained not a proper basis on which to exercise discretion to refuse to admit relevant evidence

ELGIN CONSTRUCTION COMPANY LIMITED; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL; RE GROUP OF EMPLOYEES (Jan.)

45

Practice and Procedure — Certification — Construction Industry — Pre-Hearing Vote — No one voting at pre-hearing representation vote conducted at construction site — Applicant conducting no investigation concerning lack of voters nor contacting Board — Three months later applicant's counsel requesting new vote — Objection to vote untimely — Factual basis of objection had come to the attention of the applicant before the deadline for making objections had passed — Certification application dismissed

NIMEL CONSTRUCTION LIMITED; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183 (Oct.)

1299

Practice and Procedure — Certification — Construction Industry — Reconsideration — Counsel for respondent not attending certification hearing — Board certifying union — Respondent requesting reconsideration — Respondent erroneously assuming that hearing would be adjourned based on conversation with Registrar in which Registrar told respondent to write in if it wished to amend its reply — Board denying reconsideration — Notice of hearing clearly setting out consequences of not attending hearing — Absence of counsel through his own false assumptions not a ground for reconsidering decision

SAULT STE. MARIE, THE CORPORATION OF THE CITY OF; RE L.I.U.N.A., LOCAL 1036; RE R.E. MORCAN, C.U.P.E.; RE C.J.A., LOCAL 446 (Oct.)

1319

Practice and Procedure — Certification — Construction Industry — Request for hearing by respondent denied — Short duration of employment not relevant to Board's considerations — Certificate issuing

BLACK & MCDONALD LIMITED; RE S.M.W. (Oct.)

1208

Practice and Procedure — Certification — Construction Industry — Respondent requesting a hearing on basis that certification will cause him hardship — Hearing denied — Certificate issuing

J.C. ELECTRIC, JOHN ANTHONY WAITE C.O.B. AS; RE I.B.E.W., LOCAL 1687 (Oct.)

1251

Practice and Procedure — Certification — Membership Evidence — Earlier decision varied — Respondent not permitted to add further name to employee list when list already amended

three times — Incomplete dates on membership cards cured by *viva voce* evidence — Possible ambiguity in documentary evidence concerning whether application one for membership in local or international not fatal because, as a whole, the evidence points unequivocally to membership in the applicant — Certificates issuing

MENKES DEVELOPMENTS INC.; RE L.I.U.N.A., LOCAL 506; RE L.I.U.N.A. LOCAL 183 (Oct.) 1290

Practice and Procedure — Certification — Membership Evidence — Parties executing minutes of settlement agreeing on all points except whether the Board should count membership cards signed by individuals after their last day worked — Parties' request for a hearing to make argument on that issue denied — No facts in dispute — More appropriate to receive written submissions

CATALYTIC MAINTENANCE INC.; RE L.I.U.N.A., LOCAL 1089 (Dec.) 1479

Practice and Procedure — Certification — Membership Evidence — Pre-Hearing Vote — Two certification applications consolidated under s. 103(3) and pre-hearing vote ordered — Intervener's argument that the date under s. 9(4) for determining its actual level of membership support should be its actual intervention/application date and not the deemed application date under s. 103 rejected — Intervener's certification application dismissed due to insufficient membership support — New "union/no union" vote ordered

NORTH YORK, BOARD OF EDUCATION FOR THE CITY OF; RE O.P.S.E.U.; RE O.S.S.T.F. (Jan.) 116

Practice and Procedure — Certification — Membership Evidence — Witness — Two non-pay allegations made by respondent — Credibility of collector in issue — Evidence concerning criminal convictions of two witnesses admissible — Collector not in charge of organizing campaign found to have collected two cards without proper payment — All evidence secured by that collector rejected — Lack of credibility of another witness not destroying evidentiary value of membership he collected

OLYMPIA FLOOR & WALL TILE COMPANY, OLYMPIA & YORK DEVELOPMENTS LIMITED, C.O.B. AS; RE L.I.U.N.A., LOCAL 183; RE GROUP OF EMPLOYEES (May) 762

Practice and Procedure — Certification — One-third of possible bargaining unit employees in dispute — Dispute not affecting applicant's right to certification — Whether interim certificate should issue — Question depends on whether collective bargaining can be meaningful

CATERPILLAR OF CANADA LTD.; RE C.A.W.; RE GROUP OF EMPLOYEES (Jan.) 27

Practice and Procedure — Certification — Parties — Applicant requesting hearing to determine status of intervener prior to officer examinations — Issues of law to be dealt with after officer has reported to Board — Officer ordered to continue with enquiry

HOLLINGWORTH DRAIN SERVICES; RE C.J.A., LOCAL 27 (Oct.) 1250

Practice and Procedure — Certification — Parties requesting Board amend certificate issued in 1984 to reflect existing configuration of employees — Certificate redundant once collective agreement with recognition clause entered into — Parties able to amend recognition clause of collective agreement to clarify its scope

PUBLIC SERVICE ALLIANCE OF CANADA; RE ALLIANCE EMPLOYEES' UNION; RE THE OTTAWA TYPOGRAPHICAL UNION, LOCAL 102 (Feb.) 265

Practice and Procedure — Certification — Petition — Petition filed after terminal date by employee who mistakenly believed he was not in the bargaining unit — Description of unit not amended subsequent to posting — Request to extend terminal date denied — Employ-

- ees had reasonable notice of proceedings — Employer misleading employee as to his status not sufficient grounds to extend terminal date — Petition untimely
- WE'RE ECONOPRINT FAST, 570662 ONTARIO LIMITED C.O.B. AS; RE ST. CATHARINES TYPOGRAPHICAL UNION NO. 416.....(Mar.) 440
- Practice and Procedure — Certification — Pre-Hearing Vote — Applicant requesting Board to direct the respondent to make available a list of names and mailing addresses of all employees in the voting constituency — Board not prepared to entertain request because it was not made at the labour relations officer's meeting convened for the purpose of dealing with all matters arising out of the application and request for a pre-hearing representation vote — Vote directed
- QUEEN'S UNIVERSITY AT KINGSTON; RE O.P.S.E.U.; RE C.U.P.E.(June) 925
- Practice and Procedure — Certification — Pre-Hearing Vote — Each person on voters list challenged by the employer on the basis of managerial or confidential functions — Board requiring detailed written submissions from parties on the duties and responsibilities of the persons in dispute as well as a detailed statement of material facts before determining procedure for the officer's examinations
- ALGOMA STEEL CORPORATION, LIMITED, THE; RE ALGOMA STEEL FRONT-LINE FOREMEN ASSOCIATION; RE U.S.W.A. AND U.S.W.A., LOCALS 2251, 4509, 5595, 2251, 2288(Nov.) 1341
- Practice and Procedure — Certification — Pre-Hearing Vote — Employees involved in these applications among those whose inclusion in the unit is in dispute in another case where prehearing vote has been held and ballot box sealed — Whether these applications should be postponed pending the outcome of that case, consolidated for hearing with that case pursuant to s. 103(3), or processed by ordering a pre-hearing vote as originally applied for — S. 103(3) decision deferred and pre-hearing vote ordered
- KIROUAC CONTRACTING LTD.; RE I.W.A.; RE LUMBER AND SAWMILL WORKERS UNION, LOCAL 2693 OF THE C.J.A.; RE C.P.U.(Oct.) 1262
- Practice and Procedure — Certification — Pre-Hearing Vote — Intervener requesting leave to withdraw its request for a pre-hearing vote and requesting that applicant's application be converted from a pre-hearing vote to a regular application — Requests denied — Intervener's application dismissed
- DOMTAR INC., DOMTAR FOREST PRODUCTS, WOODLANDS DIVISION; RE IWA; RE LUMBER AND SAWMILL WORKERS UNION, LOCAL 2693 OF THE C.J.A.; RE C.P.U.(Sept.) 1132
- Practice and Procedure — Certification — Pre-Hearing Vote — Reconsideration — Alleged transfer of bargaining rights between locals after certification application filed — Successor rights application concerning the transfer pending before the Board — Whether alleged successor local should be on the ballot
- QUAKER OATS COMPANY OF CANADA LIMITED, THE; RE QUAKER OATS EMPLOYEES INDEPENDENT UNION (CEREALS); RE U.F.C.W., LOCAL 293(Dec.) 1602
- Practice and Procedure — Certification — Pre-Hearing Vote — Related Employer — Applicant requesting a pre-hearing vote in ten applications for certification — Applicant also seeking a declaration that the respondents constitute one employer — Board analyzing purpose and effect of pre-hearing vote — Effect of s. 1(4) application on bargaining unit issue discussed — All drivers voted with ballots cast by employees of any one respondent separated — Ballots cast by persons alleged to be dependent or independent contractors to be segregated
- TAIGA TRUCKING (ONTARIO) 1980 INC., ET AL.; RE I.W.A.(Nov.) 1433

- Practice and Procedure — Certification — Pre-Hearing Vote — Respondent employer asking that pre-hearing representation vote be set aside because of the conduct of an employee supporter of the union in advising another employee that he was not eligible to vote — Employee eligible to vote but not voting — Reasonable diligence test to be applied to determine whether to entertain the employer's objection — Employee having adequate notice of vote — Employee's ability and opportunity to make inquiries concerning the Board's notices not interfered with — Board declining to direct new vote
ONTARIO ENGINEERED SUSPENSIONS (BLENHEIM) LTD.; RE C.A.W. (May) 768
- Practice and Procedure — Certification — Pre-Hearing Vote — Union requesting copy of the mailing list supplied by the employer to the Board for occasional teacher pre-hearing vote — Request allowed — Further requests to be honoured by the Registrar without reference to the Board
LAKEHEAD DISTRICT ROMAN CATHOLIC SEPARATE SCHOOL BOARD, THE;
RE O.C.O.T.A.; RE THE NIPISSING DISTRICT ROMAN CATHOLIC SEPARATE
SCHOOL BOARD (Sept.) 1154
- Practice and Procedure — Certification — Reconsideration — Unfair Labour Practice — Reconsideration of Board decision not to consolidate representation and unfair labour practice complaints — Purpose and effect of consolidation reviewed — Order that matters be heard together but not consolidated
DRESSER CANADA INC.; RE CAW; RE GROUP OF EMPLOYEES;
RE U.S.W.A. (Oct.) 1243
- Practice and Procedure — Certification — Representation Vote — Vote held in part-time and full-time bargaining units — Five employees in part-time unit moving to full-time unit before date vote held but voting in part-time unit — These employees not eligible to vote in either the part-time or the full-time unit — New vote ordered in part-time unit — Voter eligibility rules reviewed
LAPALME NURSING HOME LTD.; RE C.U.P.E.; RE GROUP OF
EMPLOYEES (Mar.) 406
- Practice and Procedure — Certification — Respondent asserting that intervention lacked particulars — Board reviewing its policy respecting sufficiency of particulars — Further particulars ordered
PEBRA PETERBOROUGH INC.; RE PEBRA PETERBOROUGH EMPLOYEES
ASSOCIATION; RE C.A.W. (Mar.) 421
- Practice and Procedure — Certification — Whether parties' agreement that assistant manager excluded from bargaining unit should result in the extension of the terminal date and the posting of a revised Form 6 Notice to Employees — Extension or reposting unnecessary
WORKER'S CO-OPERATIVE OF CONSUMERS (FORT WILLIAM) LIMITED; RE
U.F.C.W., LOCAL 409; RE GROUP OF EMPLOYEES (Feb.) 297
- Practice and Procedure — Charter of Rights and Freedoms — Construction Industry Grievance — Evidence — Respondent objecting to lack of particularity in grievance — Any evidence relevant to issue of violation of collective agreement admissible whether or not specific instances have been particularized — Board determining procedure to be followed in entertaining Charter argument in this case
ARLINGTON CRANE SERVICE LIMITED; RE I.U.O.E., LOCAL 793; RE OPER-
ATING ENGINEERS EMPLOYER BARGAINING AGENCY (Jan.) 7
- Practice and Procedure — Construction Industry — Jurisdictional Dispute — Sector Determination — Work dispute concerning the installation of storm sewers and catch basins —

- Whether merits of dispute should be deferred until Board determines into which sector of the construction industry the work in dispute falls
- STEEN CONTRACTORS LIMITED, L.I.U.N.A, LOCAL 597 AND; RE U.A., LOCAL 463; RE MILNE AND NICHOLLS/VANBOTS JOINT VENTURE (Jan.) 137
- Practice and Procedure — Construction Industry — Unfair Labour Practice — Unfair labour practice complaint relating to carpentry framework within the residential sector — Complaint dismissed for delay and abuse of process
- TORONTO HOUSING LABOUR BUREAU AND BRAMALEA LIMITED; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183; RE PRESIDENTIAL GROUP LIMITED AND PRESIDENTIAL GROUP (BROOKSHIRE) LIMITED (Sept.) 1178
- Practice and Procedure — Construction Industry Grievance — Principals of respondents failing to appear at hearing although given notice and properly subpoenaed — Board issuing Sheriff's warrant for their arrest — Board's authority to issue arrest warrants reviewed
- WALPAT GLASS & ALUMINUM PRODUCTS LTD. AND M & I ALUMINUM LTD.; RE P.A.T., LOCAL 1795; RE P.A.T., LOCAL 1819 (July) 1049
- Practice and Procedure — Damages — Unfair Labour Practice — Respondent's business records voluminous — Inappropriate for Board to direct respondent to move the documents away from its premises to allow the complainant to inspect them for purpose of assessment of damages — Amount of wages and benefits paid to employees working as strike replacements considered relevant to the assessment of damages
- SHAW-ALMEX INDUSTRIES LIMITED; RE U.S.W.A.; RE GROUP OF EMPLOYEES (July) 1032
- Practice and Procedure — Duty of Fair Representation — Events comprising complaint taking place in 1983 — Complaint filed in 1984 — Union's timeliness objection dismissed in 1985 and matter adjourned — Complainant failing to bring matter back on for a hearing for two years — Board declining to entertain complaint on the basis of delay resulting from the complainant's failure to pursue the matter without a satisfactory explanation
- BARANOWSKI, MICHAEL; RE TEAMSTERS' UNION, LOCAL 938 AND TNT CANADA INC., C.O.B. AS TNT RAILFAST (May) 645
- Practice and Procedure — Duty of Fair Representation — Unfair Labour Practice — Employer asking that it be named as an intervener rather than as a respondent — Board finding it desirable that employer be named as a respondent in a duty of fair representation complaint — No breach of duty by union in refusing to take complainant's discharge grievance to arbitration
- HABIB, JOSEPH E.; RE GENERAL MOTORS OF CANADA LIMITED; RE U.A.W., LOCAL 1973 (Dec.) 1501
- Practice and Procedure — Duty of Fair Representation — Unfair Labour Practice — Whether complaint should be dismissed on the basis of delay of approximately two years — Delay caused by lack of sophistication, need to obtain legal aid, and change of solicitors — Delay may be taken into account in respect of remedy — Board declining to dismiss complaint — Further hearings scheduled
- HINKSON, GEORGE; RE CANADIAN CONFERENCE OF TEAMSTERS, CHEMICAL, ENERGY & ALLIED WORKERS DIVISON, LOCAL 2177; RE BASF INMONT CANADA INC. (Oct.) 1246
- Practice and Procedure — Employee Reference — Agreement by parties on employee list during certification process — Whether union can bring an employee reference for an individual who was not on schedules — An agreement that a person is not within the unit, or on the

schedules, is not necessarily an agreement that the person is not an employee because s/he exercises managerial functions — No agreement on employee status — Officer appointed

ROYAL MATTRESS MFG. CO.; RE U.F.C.W. (Oct.) 1302

Practice and Procedure — Employee Reference — Whether nurse clinicians in hospital excluded from unit by s. 1(3)(b) — Application date in January and officer's inquiry in September and December — Passage of time not warranting departure from Board practice of determining duties and responsibilities as of application date — Management style in health care field reviewed — Nurse clinicians not employed in a confidential capacity nor exercising managerial functions

GREY BRUCE REGIONAL HEALTH CENTRE; RE ONA (July) 996

Practice and Procedure — Evidence — Respondent objecting to scope of a summons on the basis that the documents required are irrelevant — Law on production of documents through a summons reviewed — Order to bring documents to next hearing

MOLLENHAUER LIMITED; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183; RE MTABA; RE ELLIS-DON LIMITED; RE THE FORMWORK COUNCIL OF ONTARIO; RE MILNE & NICHOLLS LTD. (Sept.) 1156

Practice and Procedure — First Contract Arbitration — Termination — Termination application filed the day before the Board issued a decision directing settlement of a first contract by arbitration — Application ought to be considered subsequent to the application for a direction on the ground that the panel seized with the first contract application had nearly completed its hearing of that application — Since first contract application granted, Board required to dismiss termination application

CO-FO CONCRETE FORMING CONSTRUCTION LIMITED; RE JORGE SILVA; RE L.I.U.N.A., LOCAL 1059 (June) 828

Practice and Procedure — Health and Safety — Unfair Labour Practice — Complainant's advisor refused admittance to respondent's property for the purpose of a view — Board having authority to order view and determine who should attend — Whether press should be excluded from hearing room or prohibited from publishing any evidence until the end of the case

STEEL COMPANY OF CANADA, INC.; RE BONITA CLARK; RE THE TORONTO STAR, THE HAMILTON SPECTATOR AND THE GLOBE & MAIL; RE U.S.W.A., LOCAL 1005 (Jan.) 126

Practice and Procedure — Jurisdictional Dispute — Applicant seeking only a direction for educational purposes and not an assignment of work — No labour relations purpose served by the Board entering into an inquiry for sole purpose of declaring whether the work was properly assigned — Complaint dismissed

MAGNA INTERNATIONAL INC., COSMA, A DIVISION OF, MILLWRIGHTS UNLIMITED, ASSOCIATION OF MILLWRIGHTING CONTRACTORS OF ONTARIO INC., C.J.A., LOCAL 1916, M.C.A.O.; RE ONTARIO PIPE TRADES COUNCIL OF THE U.A. AND U.A., LOCAL 67 (May) 742

Practice and Procedure — Jurisdictional Dispute — Whether Board should entertain second complaint when first complaint dismissed for failure of complainants to appear at hearing — Subject matter of second complaint identical — Board unwilling to bar complaint as being *res judicata* — Having regard to the fact that it was the complainant's inadvertence that the

- chance to adjudicate the original complaint on its merits was lost, Board exercising its discretion to not entertain second complaint
- CATALYTIC MAINTENANCE INC., PETRO-CANADA PRODUCTS, A DIVISION OF PETRO-CANADA INC., AND E.C.W.U., LOCAL 593; RE U.A., LOCAL 46 (Nov.) 1353
- Practice and Procedure — Related Employer — Sale of a Business — Board refusing to treat a letter as an application under sections 63/1(4) — Board's Rules requiring the filing of the proper forms to be complied with
- OTTAWA STRUCTURAL CONCRETE SERVICES LTD.; RE L.I.U.N.A., LOCAL 527 (Dec.) 1599
- Practice and Procedure — Sale of a Business — Parties informing Board that they had agreed there had been a sale of the business to the respondent — Board must be satisfied that it has jurisdiction under s. 63 to make a declaration despite the agreement of the parties — Parties asked to set out the facts upon which their agreement was based — Board satisfied that sale had occurred
- UNITED CANADIAN MALT LTD.; RE U.F.C.W., LOCAL 1230 (Sept.) 1188
- Practice and Procedure — Settlement — Parties to minutes of settlement wishing to have Board make orders must indicate orders to which they have agreed — Agreement must also stipulate the existence of factual elements that give Board the jurisdiction to make the orders requested
- ELMONT CONSTRUCTION LIMITED, ET AL; RE TORONTO-CENTRAL ONTARIO BUILDING AND CONSTRUCTION TRADES COUNCIL AND B.A.C., LOCAL 2 (Feb.) 209
- Practice and Procedure — Termination — Whether panel should disqualify itself on grounds of bias or reasonable apprehension of bias — Bias allegation consisting of manner in which panel decided various preliminary matters, including the issue of whether the applicant has status to bring the application and the order in which the evidence was to be led — Panel declining to disqualify itself
- CURRENT RIVER FOODS LTD.; RE LAURA GODIN; RE U.F.C.W., LOCAL 409 ... (May) 684
- Practice and Procedure — Unfair Labour Practice — Complaint alleging respondents acted together to interfere with her right to be properly represented — Motion to dismiss complaint as disclosing no *prima facie* case — Review of jurisprudence on dismissal of complaint on such a ground — Respondents' motion dismissed
- BALANYK, ELIZABETH; RE ONA; RE GREATER NIAGARA GENERAL HOSPITAL, ET AL. (Sept.) 1121
- Practice and Procedure — Unfair Labour Practice — Employer objecting to Board hearing complaint because of delay — Employer's argument that complaint should have been filed when complainant became aware of alleged conspiracy to remove complainant from job rejected — Reasonable for complainant to file complaint only when alleged conspiracy made public — Not desirable for complainants to file suspicions — Board not prepared to dismiss complaint on basis of delay — Reverse onus provision applying to employer — Employer directed to proceed first
- CONSUMERS DISTRIBUTING COMPANY LIMITED, TEAMSTERS' UNION, LOCAL 419 AND SEAN FLOYD; RE GHIAN SAROOP PERSAUD (May) 673
- Pre-Hearing Vote — Bargaining Rights — Certification — Applicant requesting pre-hearing vote — Applicant and respondent have been parties to "agreements" which speak to terms of

employment — If applicant already has bargaining rights for employees in unit for which it seeks certification, no outcome of a vote would change those rights — Hearing scheduled so that applicant can show cause why its request for a vote should not be refused

ONTARIO HYDRO; RE THE SOCIETY OF ONTARIO HYDRO PROFESSIONAL AND ADMINISTRATIVE EMPLOYEES; RE C.U.P.E.-C.L.C. ONTARIO HYDRO EMPLOYEES UNION, LOCAL 1000; RE GROUPS OF EMPLOYEES.....(Mar.) 419

Pre-Hearing Vote — Bargaining Unit — Certification — Panel not adopting the bargaining unit description agreed to by the applicant and respondent as the voting constituency — Use of the phrase “save and except persons in bargaining units for which any trade union held bargaining rights as of . . .” inappropriate — Incumbent had not agreed to this bargaining unit description which deviates from that in the incumbent’s collective agreement — Incumbent’s bargaining unit description adopted minus language referring to employees of contractors engaged by the respondent — Vote ordered

LECOURS LUMBER COMPANY LIMITED; RE I.W.A..... (Oct.) 1286

Pre-Hearing Vote — Bargaining Unit — Certification — Parties not in agreement on the description of the appropriate bargaining unit before the vote was conducted — No one requesting a hearing after vote — Board disposing of application on the material before it without conducting a hearing — Board adopting description of voting constituency as the appropriate bargaining unit

UNITED SAWMILL LIMITED; RE I.W.A.....(Dec.) 1612

Pre-Hearing Vote — Bargaining Unit — Certification — Problems with identifying employees in the voting constituency in applications involving occasional teachers — When application of *York* test places teacher in more than one unit, teacher falls in unit to which s/he has the greatest attachment — Voting arrangements made for occasional teachers — Earlier application for certification of educational assistants to be considered with this application after vote

HAMILTON, THE BOARD OF EDUCATION FOR THE CITY OF; RE O.P.S.T.F.; RE O.S.S.T.F.....(June) 847

Pre-Hearing Vote — Bargaining Unit — Certification — *School Boards and Teachers Collective Negotiations Act*— “Bill 100 teacher” and “occasional teacher” not always mutually exclusive categories — Board determining appropriate exclusionary language for occasional teacher bargaining unit — Board declining to set aside vote on basis of inadequate notice of vote, inadequate information on the benefits of collective bargaining or low voter turnout — Certification issuing

SAULT STE. MARIE BOARD OF EDUCATION, THE; RE O.S.S.T.F.; RE NORTH YORK BOARD OF EDUCATION; RE WELLINGTON COUNTY BOARD OF EDUCATION.....(Nov.) 1425

Pre-Hearing Vote — Certification — Applicant requesting pre-hearing vote but also requesting that the appropriate unit be determined before any vote conducted — Board not having jurisdiction to conduct mid-hearing representation votes — Applicant abandoning its request for a pre-vote hearing — Voting arrangements detailed

PEEL BOARD OF EDUCATION, THE; RE O.S.S.T.F.....(July) 1030

Pre-Hearing Vote — Certification — Ballots cast in favour of applicant and against applicant equal with one segregated ballot — Agreement of parties that employee who cast segregated ballot included in unit — New vote ordered to protect secrecy of ballot cast by employee

OMSTEAD FOODS LIMITED; RE GREAT LAKES FISHERMEN AND ALLIED WORKERS’ UNION.....(Feb.) 264

- Pre-Hearing Vote — Certification — Construction Industry — Practice and Procedure — No one voting at pre-hearing representation vote conducted at construction site — Applicant conducting no investigation concerning lack of voters nor contacting Board — Three months later applicant's counsel requesting new vote — Objection to vote untimely — Factual basis of objection had come to the attention of the applicant before the deadline for making objections had passed — Certification application dismissed
- NIMEL CONSTRUCTION LIMITED; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183 (Oct.) 1299
- Pre-Hearing Vote — Certification — Fraud — Reconsideration — CPU certified following two-way vote — Intervening union claiming forged letter containing legal opinion distributed to employees prior to vote — Whether Board should revoke certificate for fraud or reconsider its decision to certify
- GREAT WEST TIMBER LIMITED; RE C.P.U.; RE LUMBER AND SAWMILL WORKERS UNION, LOCAL 2693 OF C.J.A. (Jan.) 51
- Pre-Hearing Vote — Certification — Membership Evidence — Practice and Procedure — Two certification applications consolidated under s. 103(3) and pre-hearing vote ordered — Intervener's argument that the date under s. 9(4) for determining its actual level of membership support should be its actual intervention/application date and not the deemed application date under s. 103 rejected — Intervener's certification application dismissed due to insufficient membership support — New "union/no union" vote ordered
- NORTH YORK, BOARD OF EDUCATION FOR THE CITY OF; RE O.P.S.E.U.; RE O.S.S.T.F. (Jan.) 116
- Pre-Hearing Vote — Certification — Practice and Procedure — Applicant requesting Board to direct the respondent to make available a list of names and mailing addresses of all employees in the voting constituency — Board not prepared to entertain request because it was not made at the labour relations officer's meeting convened for the purpose of dealing with all matters arising out of the application and request for a pre-hearing representation vote — Vote directed
- QUEEN'S UNIVERSITY AT KINGSTON; RE O.P.S.E.U.; RE C.U.P.E. (June) 925
- Pre-Hearing Vote — Certification — Practice and Procedure — Each person on voters list challenged by the employer on the basis of managerial or confidential functions — Board requiring detailed written submissions from parties on the duties and responsibilities of the persons in dispute as well as a detailed statement of material facts before determining procedure for the officer's examinations
- ALGOMA STEEL CORPORATION, LIMITED, THE; RE ALGOMA STEEL FRONT-LINE FOREMEN ASSOCIATION; RE U.S.W.A. AND U.S.W.A., LOCALS 2251, 4509, 5595, 2251, 2288 (Nov.) 1341
- Pre-Hearing Vote — Certification — Practice and Procedure — Employees involved in these applications among those whose inclusion in the unit is in dispute in another case where prehearing vote has been held and ballot box sealed — Whether these applications should be postponed pending the outcome of that case, consolidated for hearing with that case, or processed by ordering a pre-hearing vote as originally applied for — S. 103(3) decision deferred and pre-hearing vote ordered
- KIROUAC CONTRACTING LTD.; RE I.W.A.; RE LUMBER AND SAWMILL WORKERS UNION, LOCAL 2693 OF THE C.J.A.; RE C.P.U. (Oct.) 1262
- Pre-Hearing Vote — Certification — Practice and Procedure — Intervener requesting leave to withdraw its request for a pre-hearing vote and requesting that applicant's application be

converted from a pre-hearing vote to a regular application — Requests denied — Intervener's application dismissed

DOMTAR INC., DOMTAR FOREST PRODUCTS, WOODLANDS DIVISION; RE IWA; RE LUMBER AND SAWMILL WORKERS UNION, LOCAL 2693 OF THE C.J.A.; RE C.P.U. (Sept.) 1132

Pre-Hearing Vote — Certification — Practice and Procedure — Reconsideration — Alleged transfer of bargaining rights between locals after certification application filed — Successor rights application concerning the transfer pending before the Board — Whether alleged successor local should be on the ballot

QUAKER OATS COMPANY OF CANADA LIMITED, THE; RE QUAKER OATS EMPLOYEES INDEPENDENT UNION (CEREALS); RE U.F.C.W., LOCAL 293 (Dec.) 1602

Pre-Hearing Vote — Certification — Practice and Procedure — Related Employer — Applicant requesting a pre-hearing vote in ten applications for certification — Applicant also seeking a declaration that the respondents constitute one employer — Board analyzing purpose and effect of pre-hearing vote — Effect of s. 1(4) application on bargaining unit issue discussed — All drivers voted with ballots cast by employees of any one respondent separated — Ballots cast by persons alleged to be dependent or independent contractors to be segregated

TAIGA TRUCKING (ONTARIO) 1980 INC., ET AL.; RE I.W.A. (Nov.) 1433

Pre-Hearing Vote — Certification — Practice and Procedure — Respondent employer asking that pre-hearing representation vote be set aside because of the conduct of an employee supporter of the union in advising another employee that he was not eligible to vote — Employee eligible to vote but not voting — Reasonable diligence test to be applied to determine whether to entertain the employer's objection — Employee having adequate notice of vote — Employee's ability and opportunity to make inquiries concerning the Board's notices not interfered with — Board declining to direct new vote

ONTARIO ENGINEERED SUSPENSIONS (BLENHEIM) LTD.; RE C.A.W. (May) 768

Pre-Hearing Vote — Certification — Practice and Procedure — Union requesting copy of the mailing list supplied by the employer to the Board for occasional teacher pre-hearing vote — Request allowed — Further requests to be honoured by the Registrar without reference to the Board

LAKEHEAD DISTRICT ROMAN CATHOLIC SEPARATE SCHOOL BOARD, THE; RE O.C.O.T.A.; RE THE NIPISSING DISTRICT ROMAN CATHOLIC SEPARATE SCHOOL BOARD (Sept.) 1154

Pre-Hearing Vote — Certification — Pre-hearing vote for occasional teachers to be conducted by pool with notice to be given by mail — Respondent ordered to provide mailing labels to Board for all persons on voters' list to facilitate notification — Respondent also ordered to provide applicant with the names and addresses of those on voters' list, either in the form of mailing labels, as requested by the applicant, or in any other convenient form

WELLINGTON COUNTY BOARD OF EDUCATION; RE O.S.S.T.F. (Aug.) 1114

Pre-Hearing Vote — Certification — Voting constituency where only one employee in one of the two units the incumbent union represents — Single voting constituency combining two units appropriate — Each ballot to be segregated — Preliminary objection to timeliness of application to be dealt with after vote — Challenge to bargaining rights of applicant not entertained because no termination application before the Board

WIRE ROPE INDUSTRIES LTD.; RE I.W.A.; RE LUMBER AND SAWMILL WORKERS' UNION, LOCAL 2693 OF THE C.J.A. (Oct.) 1136

Pre-Hearing Vote — Certification — Whether Board should deny request for pre-hearing vote due to complexity of bargaining unit issues involved — Pre-hearing vote denied due to applicant's position that it already had bargaining rights — Pre-hearing vote provisions analyzed

ONTARIO HYDRO; RE THE SOCIETY OF ONTARIO HYDRO PROFESSIONAL AND ADMINISTRATIVE EMPLOYEES; RE C.U.P.E. — C.L.C. ONTARIO HYDRO EMPLOYEES UNION LOCAL 1000; RE THE COALITION TO STOP THE CERTIFICATION OF THE SOCIETY, ON BEHALF OF CERTAIN OBJECTING EMPLOYEES, AND TOM STEVENS (Dec.)

1589

Ratification and Strike Vote — Construction Industry — Duty of Fair Representation — Intimidation and Coercion — Unfair Labour Practice — Manner in which local union meetings conducted not prima facie breach of fair representation duty — Political differences in union local insufficient to indicate intimidation and coercion — Complaint with respect to entitlement to vote in I.C.I. sector strike vote must be made to Minister under s. 149a and not to Board under s. 72(5) — Complaint dismissed as disclosing no prima facie case with respect to any of the pleaded sections of the Act

CONNOLLY, MICHAEL AND UCAL POWELL; RE C.J.A., LOCAL 27 (Feb.)

193

Reconsideration — Accreditation — Reconsideration sought of 1973 accreditation decision issued by a differently constituted panel of the Board — Bargaining rights in respect of low-rise part of residential sector never exercised — Board excluding low-rise part of residential sector from accreditation certificate — Low-rise part of residential sector defined

METROPOLITAN PLUMBING AND HEATING CONTRACTORS ASSOCIATION; RE U.A., LOCAL 46 (RESIDENTIAL DIVISION); RE TORONTO HOME BUILDERS' ASSOCIATION..... (May)

745

Reconsideration — Bargaining Rights — Construction Industry — Board certifying applicant for ICI sector without a hearing based on its implied assertion that it was not an affiliated bargaining agent — Board later determining that applicant was an affiliated bargaining agent and could not represent ICI sector employees — Whether Board should revoke or amend prior certificate — Certificate revoked

RICHARD D. STEELE CONSTRUCTION (1979) LTD.; RE C.J.A., LOCAL 1030 (Aug.)

1110

Reconsideration — Bargaining Rights — Construction Industry — Effect of earlier decision to call into question applicant's bargaining relationships with several employers — Stay requested pending full reconsideration and application to Minister for designation — No legal requirement that power of reconsideration be exercised by the panel making the original decision but no grounds here to reconsider, vary, revoke or stay the original decision

EKT INDUSTRIES INC.; RE LUMBER AND SAWMILL WORKERS UNION, LOCAL 2693 OF THE C.J.A.; RE I.U.O.E., LOCAL 793; RE C.J.A., LOCAL 1669; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL AND L.I.U.N.A., LOCAL 607; RE EKT INDUSTRIES INC., TAMARRON GROUP INC., TAMARRON CONSTRUCTION LIMITED (May)

696

Reconsideration — Certification — Collective Agreement — Application requesting a change of the name on Board certificate treated as request for reconsideration — Once collective agreement negotiated, certificate spent — Parties able to amend collective agreement to reflect change in corporate name — Reconsideration dismissed

AULT FOODS LIMITED; RE U.F.C.W., LOCAL 175 (Jan.)

12

Reconsideration — Certification — Collective Agreement — Employee Reference — Amendment of certificate sought via reconsideration to exclude position of secretary/clerk — Bar-

gaining unit description in certificate was an agreed-upon one — Since certificate parties have entered into collective agreement — Board will not vary the terms of a certificate once the parties have entered into a collective agreement — Board having jurisdiction to determine whether a person is an employee but jurisdiction exercised only in accordance with *Westmount Hospital* — Request for reconsideration denied

ALMONTE NURSING HOME; RE U.F.C.W. (July) 945

Reconsideration — Certification — Construction Industry — Applicant counsel arguing Board lacked jurisdiction to reconsider its decision to certify because others, including the Minister, had relied on the decision — Grounds raised by counsel going to discretion and not to jurisdiction to reconsider — Matter relisted for hearing

BRANTCO CONSTRUCTION; RE L.I.U.N.A., LOCAL 1059; RE GROUP OF EMPLOYEES (Apr.) 472

Reconsideration — Certification — Construction Industry — Practice and Procedure — Counsel for respondent not attending certification hearing — Board certifying union — Respondent requesting reconsideration — Respondent erroneously assuming that hearing would be adjourned based on conversation with Registrar in which Registrar told respondent to write in if it wished to amend its reply — Board denying reconsideration — Notice of hearing clearly setting out consequences of not attending hearing — Absence of counsel through his own false assumptions not a ground for reconsidering decision

SAULT STE. MARIE, THE CORPORATION OF THE CITY OF; RE L.I.U.N.A., LOCAL 1036; RE R.E. MORCAN, C.U.P.E.; RE C.J.A., LOCAL 446 (Oct.) 1319

Reconsideration — Certification — Evidence — Balancing of interests requiring production of documents — Documents that are arguably relevant must be produced — Decision to produce documents confirmed

MOLLENHAUER LIMITED; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183; RE M.T.A.B.A.; RE ELLIS-DON LIMITED; RE THE FORM WORK COUNCIL OF ONTARIO; RE MILNE & NICHOLLS LTD. (Oct.) 1294

Reconsideration — Certification — Fraud — Pre-Hearing Vote — CPU certified following two-way vote — Intervening union claiming forged letter containing legal opinion distributed to employees prior to vote — Whether Board should revoke certificate for fraud or reconsider its decision to certify

GREAT WEST TIMBER LIMITED; RE C.P.U.; RE LUMBER AND SAWMILL WORKERS UNION, LOCAL 2693 OF C.J.A. (Jan.) 51

Reconsideration — Certification — Practice and Procedure — Pre-Hearing Vote — Alleged transfer of bargaining rights between locals after certification application filed — Successor rights application concerning the transfer pending before the Board — Whether alleged successor local should be on the ballot

QUAKER OATS COMPANY OF CANADA LIMITED, THE; RE QUAKER OATS EMPLOYEES INDEPENDENT UNION (CEREALS); RE U.F.C.W., LOCAL 293 (Dec.) 1602

Reconsideration — Certification — Practice and Procedure — Unfair Labour Practice — Reconsideration of Board decision not to consolidate representation and unfair labour practice complaints — Purpose and effect of consolidation reviewed — Order that matters be heard together but not consolidated

DRESSER CANADA, INC.; RE CAW; RE GROUP OF EMPLOYEES; RE U.S.W.A. (Oct.) 1243

Reconsideration — Construction Industry Grievance — Damages — Union seeking reconsidera-

tion of Board decision not to award damages for breach of collective agreement because union failed to establish that union members were available to perform the work in question — Reconsideration dismissed — Board having no evidence before it from which it could quantify the loss — Applicant not entitled to damages whether or not it had established the loss — Board having no authority to punish an employer for a breach of the collective agreement

- PIGGOTT CONSTRUCTION LIMITED; RE I.U.O.E., LOCAL 793 (Apr.) 599
- Reconsideration — Construction Industry Grievance — Earlier decision to allow grievance revoked because intervener had not received notice of the hearing — Applicant's counsel undertaking to assist respondent's counsel to recover compensation paid pursuant to earlier decision
- CATALYST TECHNOLOGY (CANADA) LTD.; RE B.B.F., LODGE 128; RE BOILERMAKER CONTRACTORS' ASSOCIATION (Sept.) 1131
- Reconsideration — Financial Statement — Settlement — Financial statements prepared by certified general accountant provided to complainant pursuant to minutes of settlement — Complainant attempting to "re-open" complaint on the basis that statements must be prepared by a chartered accountant — Audited financial statement need not be prepared by a person licensed under the *Public Accountancy Act* unless Board so directs — Party not permitted to resile from settlement — Request to reconsider complaint rejected
- HOOSAIN, TONY; RE DISTRICT COUNCIL C.J.A.; RE C.J.A., LOCAL 27 (Dec.) 1513
- Reconsideration — Remedies — Stay of Board order and reconsideration requested — Stay academic — Remedial order amended to prevent one party from determining back to work protocol — Request for reconsideration on other grounds dismissed
- SHAW-ALMEX INDUSTRIES LIMITED; RE U.S.W.A.; RE GROUP OF EMPLOYEES (Feb.) 276
- Reconsideration — Termination — Employer applying for termination and requesting that Board direct a representation vote because a substantial number of the employees in the unit have indicated they no longer wish to be represented by the respondent — Employees supporting application — Wishes of employees cannot trigger a representation issue under s. 59 — S. 59 application dismissed — Not appropriate for Board to reconsider its decision to certify the respondent — Application dismissed
- LONDON SOAP COMPANY LIMITED; RE LONDON AND DISTRICT SERVICE WORKERS' UNION, LOCAL 220; RE GROUP OF EMPLOYEES (Feb.) 241
- Reference — Change in Working Condition — Collective Agreement — Conciliation — Duty to Bargain in Good Faith — Unfair Labour Practice — Memorandum of settlement signed by union local's negotiating committee without the signature of ONA's employment relations officer — Employer aware of ONA's practice of bargaining centrally and its refusal to sign an agreement which fails to achieve wage parity with the hospital sector — Employer unable to rely on ostensible authority of negotiating committee — Document null and void as a collective agreement — Employer breaching duty to bargain in good faith by signing agreement — Breach of freeze by implementing employment terms not agreed to by union — Minister having authority to appoint a conciliation officer
- OAKRIDGE VILLA NURSING HOME; RE ONA; RE EXTENDICARE HEALTH SERVICES INC. (July) 1026
- Reference — Collective Agreement — Collective agreement between federally certified union and employer purporting to bind successors — Employer becoming bankrupt and provincially regulated employer receiving federally regulated employer's operating authority — Whether union successor rights created by agreement — Parties cannot by the collective

- agreement bind a third party to their contract — No applicable successor rights legislation — Arbitrator should not be appointed by Minister because no collective agreement in force
- BEACON TRANSIT LINES INCORPORATED; RE TEAMSTERS' UNION, LOCAL 938 (Oct.) 1206
- Reference — Conciliation — Whether Minister having authority to appoint a conciliation officer when parties have not yet attempted to bargain — Parties need not meet before the Minister can appoint a conciliation officer
- COUNTRYSIDE FARMS LIMITED; RE I.U.O.E., LOCAL 793.....(Nov.) 1365
- Reference — Construction Industry — Whether Minister should issue new designation orders and/or amend existing designation orders to permit union local to lawfully represent workers in the ICI sector of the construction industry
- LUMBER AND SAWMILL WORKERS' UNION, LOCAL 2693 OF THE C.J.A.; RE L.I.U.N.A., ONTARIO PROVINCIAL DISTRICT COUNCIL; RE L.I.U.N.A., LOCAL 607; RE C.J.A., ONTARIO PROVINCIAL COUNCIL; RE ONTARIO PROVINCIAL CONFERENCE OF THE B.A.C.; RE I.U.O.E., LOCAL 793; RE O.G.C.A.; RE CONSTRUCTION ASSOCIATION OF THUNDER BAY INC. (Dec.) 1556
- Related Employer — ATM set up by Brink's as a wholly owned subsidiary to service automatic teller machines rather than have the work done by one of Brink's Divisions — ATM and Brink's found to be related employers — Board identifying factors to be considered in deciding whether a one employer declaration should be made — Brink's corporate organization cannot be used to override the use of s. 1(4) — Applicant acted promptly to protect its bargaining rights from erosion — One employer declaration made and ATM declared to be bound by collective agreement — Nothing causing Board to limit retroactive effect of declaration
- BRINK'S CANADA LIMITED AND A.T.M. AUTOMATIC TELLER MACHINES SERVICES LTD.; RE TEAMSTERS' UNION, LOCAL 419..... (May) 647
- Related Employer — Bargaining Rights — Collective Agreement — Construction Industry — Sale of a Business — Respondent requesting that application be dismissed on the basis that no valid collective bargaining rights had ever been obtained by the applicant because the collective agreement was signed when there were no employees in the unit — *Nicholls-Radtke* distinguished — Employer had no present or future need for employees when collective agreement signed — No valid collective agreement — Sale and related employer issues academic — Application dismissed
- EIGHTY-FIVE ELECTRIC, RAYMOND BRISSON C.O.B. AS, AND RICHARD TOMINSKI C.O.B. AS R.T. ELECTRIC; RE I.B.E.W., LOCAL 1687..... (June) 833
- Related Employer — Bargaining Rights — Evidence — Non-unionized company bought by unionized company — Board relying on extrinsic evidence of past practice to determine contours of applicant's existing bargaining rights — Board exercising discretion to issue one employer declaration and declaration that non-unionized company bound by the collective agreement between the applicant and the unionized company
- MASSTRON SCALE LTD. AND TOLEDO SCALE DIVISION OF RELIANCE ELECTRIC LIMITED; RE I.A.M. (Dec.) 1578
- Related Employer — Bargaining Unit — Certification — Dependent Contractor — Union seeking to represent a unit of taxicab drivers and "owner-operators" working "under the banner" of the respondent Yellow Cab — Single car/plate owner-operators found to be dependent contractors — No affirmative evidence that owner-operator/dependent contractors wish to be included in the same unit as the helper-drivers — Two units found to be appropriate, one of dependent contractors and one of drivers — Insufficient evidence that other

- named respondents are related employers — Matter remitted back to labour relations officer
- HAMILTON YELLOW CAB COMPANY LIMITED; RE R.W.D.S.U.(Nov.) 1373
- Related Employer — Certification — Practice and Procedure — Pre-Hearing Vote — Applicant requesting a pre-hearing vote in ten applications for certification — Applicant also seeking a declaration that the respondents constitute one employer — Board analyzing purpose and effect of pre-hearing vote — Effect of s. 1(4) application on bargaining unit issue discussed — All drivers voted with ballots cast by employees of any one respondent separated — Ballots cast by persons alleged to be dependent or independent contractors to be segregated
- TAIGA TRUCKING (ONTARIO) 1980 INC., ET AL.; RE I.W.A.(Nov.) 1433
- Related Employer — Effect of related employer declaration would be to create jurisdictional dispute — Combined entity would become bound by conflicting collective agreements with two unions involving the same work — Board reluctant to make a “related employer” declaration when the effect is to create a conflict with established bargaining rights held by another union — Section 1(4) declaration not warranted
- HARDROCK FORMING COMPANY, 270915 ONTARIO LIMITED, AND 556347 ONTARIO LIMITED C.O.B. AS, DELFORM CONSTRUCTION LIMITED, ILENA CONSTRUCTION LIMITED; RE THE FORM COUNCIL OF ONTARIO, AND L.I.U.N.A., LOCAL 183; RE CARPENTERS’ DISTRICT COUNCIL OF TORONTO AND VICINITY ON BEHALF OF CARPENTERS LOCAL UNION 27, C.J.A., THE IRONWORKERS DISTRICT COUNCIL OF ONTARIO, AND B.S.O.I.W., LOCAL 721(July) 1003
- Related Employer — Practice and Procedure — Sale of a Business — Board refusing to treat a letter as an application under sections 63/1(4) — Board’s Rules requiring the filing of the proper forms to be complied with
- OTTAWA STRUCTURAL CONCRETE SERVICES LTD.; RE L.I.U.N.A., LOCAL 527(Dec.) 1599
- Religious Exemption — Applicants members of the Harvester Baptist Church — Applicants found to be sincerely religious persons but beliefs not the cause of the objection to paying union dues — Opposition grounded in social and political views — Exemption not granted where the overall thrust of the objection is not religious in nature — Application dismissed
- CARTER, DOUG, ET AL.; RE C.A.W., LOCAL 27; RE HIGHBURY FORD SALES LIMITED.....(Mar.) 343
- Religious Exemption — Roman Catholic community college teaching master requesting exemption from union dues because OFL involved in pro-choice abortion activities — Applicant’s union an affiliate of OFL — Actions of OFL too remote to found a religious objection to paying dues to OPSEU — Application dismissed
- TREMBLAY, PAUL H.; RE O.P.S.E.U.; RE GEORGIAN COLLEGE OF APPLIED ARTS & TECHNOLOGY; RE ATTORNEY GENERAL OF ONTARIO.....(Feb.) 284
- Remedies — Arbitration — Duty of Fair Representation — Practice and Procedure — Unfair Labour Practice — Direction to arbitration inappropriate remedy for union’s breach of fair representation duty when dispute between union and complainant — Board hearing merits of grievance — Rules applicable to court proceedings used to calculate interest on lost wages — Costs denied
- LECUYER, GERALD, ET AL.; RE C.P.U., LOCAL 132 AND C.P.U.; RE ABITIBI-PRICE INC.(Apr.) 529
- Remedies — Change in Working Conditions — Interference in Trade Unions — Intimidation and

Coercion — Unfair Labour Practice — Fishing boat captain and crew laid off at height of fishing season during an organizing drive — Removal of licences from boat, denying grievors an opportunity to fish, and failing to pay captain's bonus constituting a breach of the Act — Order directing respondent company to resume its fishing operations and reinstate grievors inappropriate — Compensation awarded for one fishing season — President of corporate respondent personally liable

PERALTA FOODS — ILDA C., 538391 ONTARIO LIMITED C.O.B. AS, AND VITO PERALTA; RE GREAT LAKES FISHERMEN AND ALLIED WORKERS' UNION.... (Sept.)

1162

Remedies — Change in Working Conditions — Interference in Trade Unions — Intimidation and Coercion — Unfair Labour Practice — Unprecedented six-week layoff, withholding of vacation pay and cancellation of summer hours constituting unfair labour practices — Each party required to set out in writing and in detail a complete statement of its position on compensation issue if parties unable to agree on amount of compensation to be paid grievors

UMFREVILLE DISTRICT SCHOOL AREA BOARD; RE C.U.P.E.....(Mar.)

434

Remedies — Damages — Unfair Labour Practice — Duty of unfair labour practice complainant to mitigate damages not paralleling that of former employee in a wrongful dismissal action — Complainant making reasonable efforts to mitigate her losses — Board having jurisdiction to award damages for mental distress but such damages denied here because claim made too late

JACMORR MANUFACTURING LIMITED; RE U.F.C.W.(Aug.)

1086

Remedies — Duty of Fair Referral — Duty of Fair Representation — Unfair Labour Practice — Union paying legal fees incurred by respondent in Board proceedings but not those of complainants — No breach of fair representation duty — Board having no jurisdiction to act as watchdog over internal union processes — No circumstances to warrant departure from policy of declining to award costs — Hearings protracted by both parties — Complainants' mixed success also militating against an award of costs

D'ALESSANDRO, LUCIANO AND DONATO MARINARO; RE L.I.U.N.A., LOCAL 1089, AND ROCCO D'ANDREA.....(July)

986

Remedies — Duty to Bargain in Good Faith — Interference in Trade Unions — Unfair Labour Practice — Employer failing to meet with union to bargain within 15 day period — Employer engaging in course of conduct intended to thwart any meaningful bargaining — Conduct viewed in context of massive unfair labour practices during organizing drive — Breach of duty to bargain in good faith — Attendance of member of management at union meeting contravening ss. 64 and 70 — Employer directed to prepare a collective agreement it is prepared to sign to be presented to union at a meeting with a mediator

MOREWOOD INDUSTRIES LIMITED; RE C.J.A., GENERAL WORKERS' UNION, LOCAL 1030.....(Jan.)

92

Remedies — Intimidation and Coercion — Unfair Labour Practice — Labourers' Union representative making statement to carpenters performing concrete forming on residential job site that they must join the Labourers' union to continue working on the job — Conduct amounting to intimidation and coercion in circumstances — Labourers' Union jointly responsible with employer for the damages arising from carpenters being removed from job site

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 527, ANDRE ROY AND; RE C.J.A., LOCAL 93.....(Apr.)

523

Remedies — Reconsideration — Stay of Board order and reconsideration requested — Stay aca-

demic — Remedial order amended to prevent one party from determining back to work protocol — Request for reconsideration on other grounds dismissed

SHAW-ALMEX INDUSTRIES LIMITED; RE U.S.W.A.; RE GROUP OF EMPLOYEES (Feb.)

276

Remedies — Sale of a Business — Unfair Labour Practice — Employees of predecessor employer not hired by successor — Successor employer not obliged to continue the employment practices of the predecessor because collective agreement had expired at time of sale — No refusal by respondent to enter into an employment relationship with grievors because no evidence adduced that application made or others hired — Knowledge by respondent that unidentified persons wanted to work for it not sufficient to prove breach of Act — Complaint dismissed

NEW HOLIDAY TAVERN, THE HOLIDAY (A PARTNERSHIP), HOLIDAY ENTERTAINMENT INC. (GENERAL PARTNER), FORMERLY HARVEY WEISFELD AND ALAN CHARNEY, C.O.B. AS; RE INTERNATIONAL BEVERAGE DISPENSERS AND BARTENDERS UNION, LOCAL 280 (May)

753

Remedies — Strike — Employer told that plumbers would not work until labourer removed from work site — Board finding threat of illegal strike — Request for order directing employer to cease and desist from refusing to employ the labourer denied — Employer free to decide who should perform the disputed work

NIAGARA MECHANICAL CONTRACTORS LIMITED, U.A., LOCAL 46 AND CHRIS THURROTT; RE L.I.U.N.A., LOCAL 506 (Oct.)

1295

Representation Vote — Bargaining Unit — Certification — Voter eligibility language interpreted — Whether employee promoted out of bargaining unit between date vote ordered and vote held — Officer ordered to inquire into duties and responsibilities of person in dispute as of vote date

HERBIE'S DRUG WAREHOUSE LIMITED; RE U.S.W.A.; RE GROUP OF EMPLOYEES (Nov.)

1393

Representation Vote — Bargaining Unit — Crown Transfer — Board declaring KBM to be a successor employer and determining appropriate bargaining unit — Board declining to exercise its discretion to order a representation vote of the employees in the unit because no intermingling of employees and only one union involved

KBM FORESTRY CONSULTANTS INC., THE CROWN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTRY OF NATURAL RESOURCES AND; RE O.P.S.E.U. (July)

1007

Representation Vote — Bargaining Unit — Whether appropriate to include steamfitters in plumbers unit when separate certified trades and employer not employing any steamfitters — Standard unit including steamfitters granted — Irrelevant whether there are employees in all the classifications used to describe that standard unit — Board exercising its discretion to order a representation vote because of improper union conduct

D.E. WITMER PLUMBING AND HEATING LIMITED; RE U.A., LOCAL 527; RE GROUP OF EMPLOYEES; RE BILL HENNINK AND BILL BONVANIE (Oct.)

1228

Representation Vote — Build-Up — Certification — Terminal date extended following change in bargaining unit description — Application made during pea-picking season — Work force expected to expand during corn season — Whether representation vote should be ordered — Employees on the application date "representative" of the employer's employment environment — Vote unnecessary — Certificate issuing

COBI FOODS INC.; RE U.F.C.W. (June)

815

Representation Vote — Certification — Construction Industry — Petition — Employee absent from work on application date due to injury not included in unit for purpose of the count — Petition found to be voluntary despite fact that petitioner retained same lawyer that represented the employer — Operation of employer suspended during winter season — Vote postponed until employees are employed in the unit	
A. VUKOVIC FORMING CO., ANTON VUKOVIC C.O.B. AS; RE L.I.U.N.A., LOCAL 527; RE RICHARD LOOP (Mar.)	311
Representation Vote — Certification — Following announcement of the count, union opponents asserting that Board should not give effect to representation vote in favour of union — Allegations of intimidation not raised in a timely manner indicating reaction to outcome of vote rather than atmosphere in which it was conducted — Certificate issuing	
CONCORDE METAL STAMPINGS; RE C.A.W.; RE GROUP OF EMPLOYEES (Jan.)	34
Representation Vote — Certification — Practice and Procedure — Vote held in part-time and full-time bargaining units — Five employees in part-time unit moving to full-time unit before date vote held but voting in part-time unit — These employees not eligible to vote in either the part-time or the full-time unit — New vote ordered in part-time unit — Voter eligibility rules reviewed	
LAPALME NURSING HOME LTD.; RE C.U.P.E.; RE GROUP OF EMPLOYEES (Mar.)	406
Representation Vote — Construction Industry — Termination — Respondent alleging applicant not entitled to vote because he was not at work in the voting constituency prior to the vote being taken — Voter eligibility rules reviewed — Individual must be “at work in” the voting constituency both on date vote is ordered and date vote is held in construction industry termination vote — “At work in” requiring physical presence at work — Employee need not be at work in the voting constituency between the two material dates to be eligible to vote — Bargaining rights terminated	
CITY PLUMBING (KITCHENER) LIMITED; RE RICHARD GRANDY; RE THE ONTARIO PIPE TRADES COUNCIL OF THE U.A., LOCAL 527 (June)	810
Representation Vote — Termination — Two employees listed on employee list as being part-time — Employer cannot later refile from this representation that the employees were not eligible to vote in the full-time unit — Union alleging that employer represented to the union outside the proceedings that two other employees were not in the unit — Conduct of employer in the workplace in relation to these employees not affecting eligibility to vote — These two ballots counted	
C.E. JAMIESON & CO. (DOMINION) LIMITED; RE HAKIM SAMAD; RE E.C.W.U. (July)	953
Representation Vote — Termination — Voter eligibility rules reviewed — Employee “on the payroll” in the sense of using up vacation entitlement and sick pay credits before formally retiring not eligible to vote — Fact that employee continued to have union dues deducted from pay not detracting from that conclusion — Applicant involved in a car accident and not able to vote — Board denying her another opportunity to vote — Ballots ordered counted	
STRATHROY NURSING HOMES LIMITED; RE JOAN TIMOTHY; RE LONDON AND DISTRICT SERVICE WORKERS’ UNION, LOCAL 220, S.E.I.U. (Dec.)	1606
Right of Access — Access order for construction project where employees reside in temporary	

- lodgings on site agreed to by parties — Employer's request that union representatives be required to sign a waiver of liability for any injuries that may occur while on site rejected
GASTON H. POULIN CONTRACTOR LIMITED; RE I.U.O.E., LOCAL 793.....(Jan.) 48
- Right of Access — Board declining to restrict access of the applicant to days when representatives of another union which had already been given access were not on site
LEDCOR INDUSTRIES LTD. AND CASTONGUAY BLASTING LTD.; RE L.I.U.N.A., LOCAL 607.....(Dec.) 1554
- Right of Access — Consent to Prosecute — Respondent denying access to its premises to an official of the applicant in breach of Board's order under s. 11 — Board granting consent to prosecute
GASTON H. POULIN CONTRACTOR LIMITED; RE I.U.O.E., LOCAL 793.... (Feb.) 219
- Right of Access — Dispute over terms of the access direction — Whether access to bunk house should be limited — Whether hours of access should be restricted — Access order to expire on terminal date fixed in any future certification application
LEDCORE INDUSTRIES LIMITED; RE I.U.O.E., LOCAL 793(Nov.) 1399
- Right of Access — Parties — Incumbent union allowed to intervene in raiding union's access application — Board reviewing access jurisprudence — Access section not intended to apply only to geographically remote work sites — Access ordered on terms
GREAT LAKES FOREST PRODUCTS LTD. (LAKEHEAD WOODLANDS DIVISION); RE I.W.A. CANADIAN REGIONAL COUNCIL NO. 1; RE C.P.U.; RE LUMBER AND SAWMILL WORKERS' UNION (Sept.) 1136
- Right of Access — Parties — Raiding union seeking access order — Incumbent union seeking to intervene to oppose order — Access order not infringing any legal rights or interests of incumbent union — Intervener status denied
DOMTAR INC.; RE C.P.U.(Apr.) 485
- Right of Access — Terms of access order determined — Mere possibility of violence not a compelling reason to restrict access to bunkhouse — No reason to direct a more limited duration of the order than one year
MADELEINE MINES LTD.; RE I.U.O.E., LOCAL 793.....(Dec.) 1574
- Sale of a Business — Bargaining Rights — Collective Agreement — Construction Industry — Related employer — Respondent requesting that application be dismissed on the basis that no valid collective bargaining rights had ever been obtained by the applicant because the collective agreement was signed when there were no employees in the unit — *Nicholls-Radtke* distinguished — Employer had no present or future need for employees when collective agreement signed — No valid collective agreement — Sale and related employer issues academic — Application dismissed
EIGHTY-FIVE ELECTRIC, RAYMOND BRISSON C.O.B. AS, AND RICHARD TOMINSKI C.O.B. AS R.T. ELECTRIC; RE I.B.E.W., LOCAL 1687..... (June) 833
- Sale of a Business — Construction Industry — Cash proceeds from the liquidation of a partnership business used to start a new general contracting business by one of the partners — Essence of a business in a bid-oriented sector of the construction industry resides in man-

agement personnel's expertise — Transfer of key man services constituting sale of a business

STUCOR CONSTRUCTION LTD.; RE I.U.O.E., LOCAL 793; RE STEWART & HINAN CONSTRUCTION LIMITED, STEWART & HINAN CONTRACTORS LIMITED, STUCOR CONSTRUCTION LTD., RESOURCE EQUIPMENT LIMITED.....(Apr.) 614

Sale of a Business — Practice and Procedure — Parties informing Board that they had agreed there had been a sale of the business to the respondent — Board must be satisfied that it has jurisdiction under s. 63 to make a declaration despite the agreement of the parties — Parties asked to set out the facts upon which their agreement was based — Board satisfied that sale had occurred.

UNITED CANADIAN MALT LTD.; RE U.F.C.W., LOCAL 1230 (Sept.) 1188

Sale of a Business — Practice and Procedure — Related Employer — Board refusing to treat a letter as an application under sections 63/1(4) — Board's Rules requiring the filing of the proper forms to be complied with

OTTAWA STRUCTURAL CONCRETE SERVICES LTD.; RE L.I.U.N.A., LOCAL 527 (Dec.) 1599

Sale of a Business — Remedies — Unfair Labour Practice — Employees of predecessor employer not hired by successor — Successor employer not obliged to continue the employment practices of the predecessor because collective agreement had expired at time of sale — No refusal by respondent to enter into an employment relationship with grievors because no evidence adduced that application made or others hired — Knowledge by respondent that unidentified persons wanted to work for it not sufficient to prove breach of Act — Complaint dismissed

NEW HOLIDAY TAVERN, THE HOLIDAY (A PARTNERSHIP), HOLIDAY ENTERTAINMENT INC. (GENERAL PARTNER), FORMERLY HARVEY WEISFELD AND ALAN CHARNEY, C.O.B. AS; RE INTERNATIONAL BEVERAGE DISPENSERS AND BARTENDERS UNION, LOCAL 280 (May) 753

Sale of a Business — Respondent insurance company having obligation central to its business as a landlord regarding the provision of cleaning services to its tenants — Cleaning services contracted out for reasons of economy — Bona fide contracting out arrangement and not a sale of a business — Application dismissed

METROPOLITAN LIFE INSURANCE COMPANY; RE I.U.O.E., LOCAL 796..(Mar.) 413

Sale of a Business — Transfer of drinking establishment and liquor licence — Sale of business although transfer not a direct one and establishment closed for several months — Change in ambiance and clientele not a substantial change in the nature of the business that continued representation by the union would be inappropriate — Respondent declared to be successor employer

KRUSH, JOHN KATSURAS C.O.B. AS; RE LOCAL 280 OF THE INTERNATIONAL BEVERAGE DISPENSERS' & BARTENDERS' UNION OF THE HOTEL AND RESTAURANT EMPLOYEES' AND BARTENDERS' INTERNATIONAL UNION . (June) 859

School Boards and Teachers Collective Negotiations Act — Bargaining Unit — Certification — Pre-Hearing Vote — "Bill 100 teacher" and "occasional teacher" not always mutually exclusive categories — Board determining appropriate exclusionary language for occasional teacher bargaining unit — Board declining to set aside vote on basis of inadequate notice of

- vote, inadequate information on the benefits of collective bargaining or low voter turnout
— Certificates issuing
- SAULT STE. MARIE BOARD OF EDUCATION, THE; RE O.S.S.T.F.; RE NORTH YORK BOARD OF EDUCATION; RE WELLINGTON COUNTY BOARD OF EDUCATION (Nov.) 1425
- Sector Determination — Construction Industry — Jurisdictional Dispute — Practice and Procedure — Work dispute concerning the installation of storm sewers and catch basins — Whether merits of dispute should be deferred until Board determines into which sector of the construction industry the work in dispute falls
- STEEN CONTRACTORS LIMITED, L.I.U.N.A., LOCAL 597 AND; RE U.A., LOCAL 463; RE MILNE AND NICHOLLS/VANBOTS JOINT VENTURE (Jan.) 137
- Sector Determination — Evidence — Jurisdictional Dispute — Whether Board should hear evidence of area practice in making sectoral determination under s. 150 — Legislature never intended to introduce concept of area practice or geographic area into sectoral determination — Labour relations best served by not making distinctions among the trades in sectoral determinations — Further hearing set to hear evidence of the work characteristics of the work in dispute
- ARMBRO MATERIALS AND CONSTRUCTION LIMITED, AND L.I.U.N.A., LOCAL 183; RE U.A., LOCAL 599; RE I.U.O.E., LOCAL 793; RE METROPOLITAN TORONTO SEWER AND WATERMAIN CONTRACTORS ASSOCIATION (July) 948
- Settlement — Board will only make a declaration, direction or order pursuant to a settlement if there is express agreement that it do so and if the Board has jurisdiction to do so — Use of phrase “endorse the record” in minutes of settlement discouraged
- CONSOLIDATED ALUMINUM (MARITIMES) LTD.; RE P.A.T., LOCAL 1824; RE CONSOLIDATED ALUMINUM & GLASS CORP. (Mar.) 350
- Settlement — Financial Statement — Reconsideration — Financial Statements prepared by certified general accountant provided to complainant pursuant to minutes of settlement — Complainant attempting to “re-open” complaint on the basis that statements must be prepared by a chartered accountant — Audited financial statement need not be prepared by a person licensed under the *Public Accountancy Act* unless Board so directs — Party not permitted to resile from settlement — Request to reconsider complaint rejected
- HOOSAIN, TONY; RE DISTRICT COUNCIL C.J.A.; RE C.J.A., LOCAL 27 (Dec.) 1513
- Settlement — Practice and Procedure — Parties to minutes of settlement wishing to have Board make orders must indicate orders to which they have agreed — Agreement must also stipulate the existence of factual elements that give Board the jurisdiction to make the orders requested
- ELMONT CONSTRUCTION LIMITED, ET AL.; RE TORONTO-CENTRAL ONTARIO BUILDING AND CONSTRUCTION TRADES COUNCIL AND B.A.C., LOCAL 2 (Feb.) 209
- Settlement — Unfair Labour Practice — Complainant signing minutes of settlement providing for withdrawal of complaint upon cash payment — Later claiming that settlement not legally binding because she was not represented by counsel and because the consequences of the agreement — Party not allowed to repudiate a settlement because it falls short of what legal counsel may have obtained — Complaint withdrawn in accordance with the minutes of settlement
- LAMBTON COUNTY BOARD OF EDUCATION, THE, C.U.P.E., LOCAL 1019 AND; RE BETTY JEAN LUNO (Oct.) 1277

- Strike — Construction Industry — Union business representative indicating to applicant's project manager that if applicant used a non-union sub-contractor an information picket line would be set up — Applicant seeking a remedy enjoining any further threats and an order enjoining picketing — Union representative having no intention of setting up picket line — Board refusing to exercise its discretion to grant any remedy — Application dismissed
- ACME BUILDING AND CONSTRUCTION LIMITED; RE P.A.T., LOCAL 1671 AND ARTHUR VERNERS (Feb.) 179
- Strike — Construction Industry Grievance — Employer alleging that no strike provision in collective agreement violated — Board finding violation of provision initiated by union representatives at the behest of the union president who was using the powers of his office to punish the employer for refusing to give him an unsecured personal loan — Board making declaration of breach of collective agreement and awarding damages for wages the employer paid to its employees for hours which they did not work
- BELMONT PLASTERING CO., BEN PLASTERING LIMITED, C.O.B. AS; RE DRY-WALL, ACOUSTIC, LATHING AND INSULATION, LOCAL 675, C.J.A. (Nov.) 1347
- Strike — Remedies — Employer told that plumbers would not work until labourer removed from work site — Board finding threat of illegal strike — Request for order directing employer to cease and desist from refusing to employ the labourer denied — Employer free to decide who should perform the disputed work
- NIAGARA MECHANICAL CONTRACTORS LIMITED, U.A., LOCAL 46 AND CHRIS THURROTT; RE L.I.U.N.A., LOCAL 506 (Oct.) 1295
- Strike — Whether refusal of employees to work overtime constituting an illegal strike — History of employees declining to work overtime whenever there is a layoff — Union posting by-law restricting overtime whenever layoff begins — Board declining to decide whether strike — Board declining to exercise its discretion in favour of issuing a declaration or associated remedies
- MACMILLAN BATHURST INC.; RE C.P.U., LOCAL 1497, ET AL. (Dec.) 1568
- Termination — Abandonment — Bargaining Rights — No negotiations taking place between the applicant and the respondent subsequent to the sending of a notice to bargain — No contact at all for one year — Events subsequent to the filing of the termination application of little probative value — Forgetting about unit not a valid explanation for inactivity — Representation vote ordered
- NORRIS TRANSPORT LIMITED; RE TEAMSTERS' UNION, LOCAL 879 (Apr.) 570
- Termination — Bargaining Unit — Challenge to list of employees filed by the employer on the basis that the three individuals in question could not have performed any bargaining unit work but for the employer's violation of the collective agreement — Three individuals not having status as bargaining unit employees and therefore not properly on the employee list — Application dismissed
- CORECON CONSTRUCTION LIMITED; RE C.J.A., LOCAL 27; RE EMPLOYEES OF CORECON CONSTRUCTION (Dec.) 1480
- Termination — Charter of Rights and Freedoms — Timeliness — Application for termination made after the appointment of a conciliation officer — Argument rejected that trade union has an obligation to advise the employees in the unit of its intention to apply for the appointment of a conciliation officer because that cuts off open period for termination applications — Charter argument relating to freedom of association not entertained

because Attorneys General had not been notified — Termination application dismissed as untimely

CONNIE STEEL PRODUCTS LIMITED; RE LEONARDO DELPRETE, ET AL.; RE B.S.O.I.W., SHOPMEN'S LOCAL UNION NO. 834 (Oct.)

1225

Termination — Construction Industry — Representation Vote — Respondent alleging applicant not entitled to vote because he was not at work in the voting constituency prior to the vote being taken — Voter eligibility rules reviewed — Individual must be “at work in” the voting constituency both on date vote is ordered and date vote is held in construction industry termination vote — “At work in” requiring physical presence at work — Employee need not be at work in the voting constituency between the two material dates to be eligible to vote — Bargaining rights terminated

CITY PLUMBING (KITCHENER) LIMITED; RE RICHARD GRANDY; RE THE ONTARIO PIPE TRADES COUNCIL OF THE U.A., LOCAL 527 (June)

810

Termination — First Contract Arbitration — Practice and Procedure — Termination application filed the day before the Board issued a decision directing settlement of a first contract by arbitration — Application ought to be considered subsequent to the application for a direction on the ground that the panel seized with the first contract application had nearly completed its hearing of that application — Since first contract application granted, Board required to dismiss termination application

CO-FO CONCRETE FORMING CONSTRUCTION LIMITED; RE JORGE SILVA; RE L.I.U.N.A., LOCAL 1059 (June)

828

Termination — Fraud — Applicants alleging that employees intimidated into signing membership cards during organizing drive — Allegations not constituting fraud — Meaning of fraud should not be expanded to include charges which can be filed under other sections of the Act — Application dismissed

EASY ENTERPRISES INC.; RE CHARLENE BANWAIT; RE LAUNDRY AND LINEN DRIVERS AND INDUSTRIAL WORKERS UNION, TEAMSTERS LOCAL 847 (July)

994

Termination — Notice to bargain sent outside sixty-day period set out in Act — Numerous unfair labour practice complaints filed by union — Collective bargaining proposals difficult to develop in taxi industry — Haste in filing application a relevant factor — Whether Board should consider conduct following the date on which the termination application was filed — Application dismissed

CITY CAB, ABC TAXI (BROCKVILLE) LTD., AND SAFEDRIVE INC., C.O.B. AS; RE MOHINDER GILL; RE R.W.D.S.U.; RE GROUP OF EMPLOYEES (July)

955

Termination — Parties — petition — Whether petitions should be rejected because they do not specifically identify the locals of the union affected by the application — Whether applicant can seek termination of bargaining rights in respect of three units when he is a member of only one unit — Local designation not significant to employees signing petitions — Employees found to have authorized applicant to file termination application on their behalf — Vote ordered

HUNTSVILLE I.G.A.; RE CECIL DEHAAN; RE U.F.C.W., LOCALS 633 AND 175 (Dec.)

1517

Termination — Petition — All employees laid off shortly after certification — Breach of sections 70 and 79 but not 64 and 66 — Applicant receiving guidance on petition from previously employed superintendent — Majority finding petition voluntary — Board discussing dis-

inction between a petition in a certification application and a petition in a termination application — Vote ordered

HURON STEEL FABRICATORS (LONDON) LIMITED; RE PAUL PETRUS; RE C.J.A. LOCAL 3054.....(Dec.) 1522

Termination — Petition — Certification application withdrawn when settlement reached that employer would voluntarily recognize the union — Termination application brought under s. 60 by one of the petitioners in the certification application — Whether petition initially filed in the certification application can be raised by the applicant as relevant to whether or not the union was entitled to represent the employees in the unit at the time of voluntary recognition — Petition not relevant in this application — Application dismissed

MARKS, EUGENE; RE U.F.C.W., LOCAL 617 (June) 872

Termination — Petition — Counterpetition reducing support for termination application below 45 percent — Applicant challenging Board's jurisdiction to give effect to counterpetition in deciding whether to order a vote in a termination application — Purposive interpretation of s. 57(3) adopted — Termination application dismissed

T. EATON COMPANY LIMITED; RE R.W.D.S.U.; RE ALEX NIGRO.....(Jan.) 166

Termination — Petition — Employer giving wage increases to employees in its non-unionized stores but not to employees covered by collective agreements — Purpose of increase not the origination of termination applications — Supporters of petitions including department section heads — Employees not perceiving section heads as agents of management — Petitions found voluntary — Representation votes ordered

T. EATON COMPANY LIMITED; RE R.W.D.S.U.; RE VAL MCKEAN, ET AL.(Jan.) 141

Termination — Petition — First termination application withdrawn — Inquiry into voluntariness of second petition must include consideration of circumstances surrounding first petition — Originator of petition stepping beyond bounds of permissible salesmanship — Employees perceiving originator as linked with management — Application dismissed

IMPERIAL CLEVITE CANADA INC.; RE BERNARD JOHN MOORE; RE I.A.M., LOCAL 1975; RE GROUP OF EMPLOYEES(Mar.) 375

Termination — Petition — Supervisor becoming member of bargaining unit — Supervisor originating and circulating petition — All of the employees he formerly supervised signing the petition — Identification with management casting doubt on voluntariness of petition — Application dismissed

JOHNSON MATTHEY LIMITED, REMBRANDT JEWELRY MANUFACTURING, A DIVISION OF; RE BRUNO FIORINI; RE U.S.W.A., DISTRICT #6(Apr.) 518

Termination — Practice and Procedure — Whether panel should disqualify itself on grounds of bias or reasonable apprehension of bias — Bias allegation consisting of manner in which panel decided various preliminary matters, including the issue of whether the applicant had status to bring the application and the order in which the evidence was to be led — Panel declining to disqualify itself

CURRENT RIVER FOODS LTD.; RE LAURA GODIN; RE U.F.C.W., LOCAL 409 (May) 684

Termination — Reconsideration — Employer applying for termination and requesting that Board direct a representation vote because a substantial number of the employees in the unit have indicated they no longer wish to be represented by the respondent — Employees supporting application — Wishes of employees cannot trigger a representation issue under s. 59 —

S. 59 application dismissed — Not appropriate for Board to reconsider its decision to certify the respondent — Application dismissed

LONDON SOAP COMPANY LIMITED; RE LONDON AND DISTRICT SERVICE WORKERS' UNION, LOCAL 220; RE GROUP OF EMPLOYEES (Feb.)

241

Termination — Representation Vote — Two employees listed on employee list as being part-time — Employer cannot later resile from this representation that the employees were not eligible to vote in the full-time unit — Union alleging that employer represented to the union outside the proceedings that two other employees were not in the unit — Conduct of employer in the workplace in relation to these employees not affecting eligibility to vote — These two ballots counted

C.E. JAMIESON & CO. (DOMINION) LIMITED; RE HAKIM SAMAD; RE E.C.W.U. (July)

953

Termination — Representation Vote — Voter eligibility rules reviewed — Employee "on the payroll" in the sense of using up vacation entitlement and sick pay credit before formally retiring not eligible to vote — Fact that employee continued to have union dues deducted from pay not detracting from that conclusion — Applicant involved in a car accident and not able to vote — Board denying her another opportunity to vote — Ballots ordered counted

STRATHROY NURSING HOMES LIMITED; RE JOAN TIMOTHY; RE LONDON AND DISTRICT SERVICE WORKERS' UNION, LOCAL 220, S.E.I.U. (Dec.)

1606

Termination — Timeliness — Termination application untimely — Dismissal for untimeliness not a bar to a subsequent application

ROBIN HOOD MULTIFOODS INC. GLASSGOODS DIVISION; RE JEAN MINOR; RE U.F.C.W., LOCAL 175. (Nov.)

1422

Timeliness — Bargaining Unit — Certification — Collective Agreement — Whether collective agreement in existence so as to render certification application untimely — Incumbent union having given timely notice to bargain — Collective agreement expiring — Certification application timely — Only one employee in office unit — Board departing from practice of separating office and plant units

WIRE ROPE INDUSTRIES LTD.; RE I.W.A.; RE LUMBER AND SAWMILL WORKERS' UNION, LOCAL 2693 OF THE C.J.A. (Dec.)

1613

Timeliness — Charter of Rights and Freedoms — Termination — Application for termination made after the appointment of a conciliation officer — Argument that trade union has an obligation to advise the employees in the unit of its intention to apply for the appointment of a conciliation officer because that cuts off open period for termination applications rejected — Charter argument relating to freedom of association not entertained because Attorneys General had not been notified — Termination application dismissed as untimely

CONNIE STEEL PRODUCTS LIMITED; RE LEONARDO DELPRETE, ET AL.; RE B.S.O.I.W., SHOPMEN'S LOCAL UNION NO. 834 (Oct.)

1225

Timeliness — Construction Industry Grievance — Whether applicant employer can recover an alleged improper overpayment, as against an individual employee, through a grievance formally against a trade union but specifying the individual concerned — Application dismissed for delay — Pursuit of redress in another forum not constituting reasonable grounds for delay in filing a complaint with the Board

ELECTRICAL POWER SYSTEMS CONSTRUCTION ASSOCIATION, THE; RE B.S.O.I.W. (Aug.)

1079

Timeliness — Termination — Termination application untimely — Dismissal for untimeliness not a bar to a subsequent application	
ROBIN HOOD MULTIFOODS INC. GLASSGOODS DIVISION; RE JEAN MINOR; RE U.F.C.W., LOCAL 175.....(Nov.)	1422
Trade Union Status — Abandonment — Certification — Collective Agreement — Applicant arguing intervener had lost its trade union status by ignoring its constitution for several years — Intervener found to not entirely have abandoned its constitution — Not ceasing to operate as a trade union — Intervener not having abandoned its bargaining rights through inactivity — Foreman not involved in the administration of the union so as to deem agreement not to be a collective agreement — Collective agreement between intervener and respondent constituting a bar to the certification application	
L'ABBE CONSTRUCTION (ONTARIO) LTD.; RE L.I.U.N.A., LOCAL 527; RE CANADIAN CONSTRUCTION, BUILDING MAINTENANCE AND GENERAL WORKERS' UNION (N.C.C.L.) (Oct.)	1191
Trade Union Status — Certification — Construction Industry — Respondent an employer in the construction industry and its employees are employees in the construction industry — Whether trade union which does not pertain to construction industry may apply for certification in respect of an employer or employees that are within the construction industry — Applicant may bring application under the general provisions of the Act	
PICKERING WELDING & STEEL SUPPLY, KENYOD LIMITED TRADING AS; RE U.S.W.A. (Apr.)	595
Trade Union Status — Certification — Whether local chartered by CLC is a trade union — When charter granted, the contractual relationship necessary was created — No evidence that employees confused about what they were joining — Applicant found to be a trade union — Vote ordered	
LAVAL TOOL & MOULD INC.; RE WINDSOR MOULDMAKERS UNION, LOCAL 1680, C.L.C.; RE GROUP OF EMPLOYEES (Oct.)	1281
Trade Union Status — Union Successor Status — Applicant claiming it is a successor trade union by virtue of disaffiliation with the respondent — Whether applicant disaffiliated with bargaining rights for intervener — Whether applicant is a trade union — Applicant found to have disaffiliated with its bargaining rights — Considerations with respect to establishing trade union status for new organizations inappropriate — Applicant Local was a trade union prior to disaffiliation and continues to hold its status as a trade union — Name of applicant at most a technical irregularity which cannot defeat a meritorious application — As applicant had not acquired bargaining rights by means of a transfer of jurisdiction, it is not a successor within the meaning of the Act — Application dismissed	
COCA-COLA LTD.; RE INDEPENDENT LOCAL 385; RE B.F.C.S.D. AND ITS LOCAL 385 AND THE U.F.C.W. (May)	658
Unfair Labour Practice — Arbitration — Duty of Fair Representation — Practice and Procedure — Remedies — Direction to arbitration inappropriate remedy for union's breach of fair representation duty when dispute between union and complainant — Board hearing merits of grievance — Rules applicable to court proceedings used to calculate interest on lost wages — Costs denied	
LECUYER, GERALD, ET AL.; RE C.P.U., LOCAL 132 AND C.P.U.; RE ABITIBI-PRICE INC. (Apr.)	529
Unfair Labour Practice — Bargaining Unit — Certification Where Act Contravened — Geographic scope of bargaining units in lumber industry — Comments in letter from employer	

to employees contravening ss. 64 and 70 — Employees still able to freely express choice in representation vote — Vote ordered

SYLVOR LIMITEE, SYNCO TIMBER LIMITED; RE LUMBER AND SAWMILL WORKERS' UNION, LOCAL 2995 OF C.J.A.; RE ROGER PAQUIN..... (Jan.)

128

Unfair Labour Practice — Certification — Interference in Trade Unions — Intimidation and Coercion — Petition — Three employees called individually into management's office and questioned about union organizing drive — Board concluding most employees would have become aware of interviews and their contents — Bonus cheques given to employees — Scheme of payment of first-time bonuses during one-to-one meetings with employees designed to exert pressure on employees to oppose the union — Exertion of pressure and undue influence breach of Act — Petition not voluntary — Union certified and posting ordered

HAYLOFT STEAKHOUSE LIMITED; RE U.F.C.W., LOCAL 175; RE GROUP OF EMPLOYEES..... (May)

717

Unfair Labour Practice — Certification — Practice and Procedure — Reconsideration — Reconsideration of Board decision not to consolidate representation and unfair labour practice complaints — Purpose and effect of consolidation reviewed — Order that matters be heard together but not consolidated

DRESSER CANADA, INC.; RE CAW; RE GROUP OF EMPLOYEES; RE U.S.W.A..... (Oct.)

1243

Unfair Labour Practice — Certification Where Act Contravened — Charter of Rights and Freedoms — Layoff and intimidation of employees, and granting of wage increases constituting unfair labour practices — Letter to employees from president of company proper exercise of employer free speech — Reverse onus not contrary to Charter — Petition rejected — First contract legislation not altering section 8 jurisprudence — Certificate issuing — Unnecessary for union to call every grievor as a witness — All laid-off employees reinstated with compensation

KNOB HILL FARMS LIMITED; RE U.F.C.W., LOCAL 206; RE GROUP OF EMPLOYEES..... (Dec.)

1531

Unfair Labour Practice — Certification Where Act Contravened — Interference in Trade Unions — Letter sent by president of respondent suggesting link between unionization and possible loss of jobs going beyond boundaries of freedom of speech — Lead hands not excluded from bargaining unit but acting on behalf of management in violation of sections 64 and 66 — Layoffs partly motivated by anti-union animus — Employer involvement in employee association designed to diminish appeal of a union violation of Act — Union certified pursuant to section 8

CAMBRIDGE CANADIAN FOODS INC.; RE U.F.C.W., LOCAL 1000A; RE GROUP OF EMPLOYEES..... (Mar.)

319

Unfair Labour Practice — Certification Where Act Contravened — Whether wishes of employees not likely to be ascertained in a vote an objective test — Testimony concerning impact of employer misconduct on individual employees excluded — Applicant certified without vote

ZEST FURNITURE INDUSTRIES LIMITED; RE L.I.U.N.A., LOCAL 183; RE GROUP OF EMPLOYEES..... (Feb.)

299

Unfair Labour Practice — Change in Working Conditions — Collective Agreement — Conciliation — Duty to Bargain in Good Faith — Reference — Memorandum of settlement signed by union local's negotiating committee without the signature of ONA's employment relations officer — Employer aware of ONA's practice of bargaining centrally and its refusal to sign an agreement which fails to achieve wage parity with the hospital sector — Employer

unable to rely on ostensible authority of negotiating committee — Document null and void as a collective agreement — Employer breaching duty to bargain in good faith by signing agreement — Breach of freeze by implementing employment terms not agreed to by union — Minister having authority to appoint a conciliation officer

OAKRIDGE VILLA NURSING HOME; RE ONA; RE EXTENDICARE HEALTH SERVICES INC. (July) 1026

Unfair Labour Practice — Change in Working Conditions — Employer implementing Sunday hours during freeze period — Process of selection of employees to work voluntary — Due to uniqueness of Sunday, change beyond the employer's protected scheduling rights — Breach of s. 79 — No remedial relief awarded

ANDERSON'S CITY FARM VALU-MART; RE U.F.C.W., LOCAL 1000A (Jan.) 1

Unfair Labour Practice — Change in Working Conditions — Interference in Trade Unions — Intimidation and Coercion — Remedies — Fishing boat captain and crew laid off at height of fishing season during an organizing drive — Removal of licences from boat, denying grievors an opportunity to fish, and failing to pay captain's bonus constituting a breach of the Act — Order directing respondent company to resume its fishing operations and reinstate grievors inappropriate — Compensation awarded for one fishing season — President of corporate respondent personally liable

PERALTA FOODS-ILDA C., 538391 ONTARIO LIMITED C.O.B. AS, AND VITO PERALTA; RE GREAT LAKES FISHERMEN AND ALLIED WORKERS' UNION (Sept.) 1162

Unfair Labour Practice — Change in Working Conditions — Interference in Trade Unions — Intimidation and Coercion — Remedies — Unprecedented six-week layoff, withholding of vacation pay and cancellation of summer hours constituting unfair labour practices — Each party required to set out in writing and in detail a complete statement of its position on compensation issue if parties unable to agree on amount of compensation to be paid grievors

UMFREVILLE DISTRICT SCHOOL AREA BOARD; RE C.U.P.E. (Mar.) 434

Unfair Labour Practice — Change in Working Conditions — Parties — Individual employee not having standing to allege breach of statutory freeze

BLUE LINE TAXI LTD.; RE GREGORY BARRETT; RE THE CORPORATION OF THE CITY OF OTTAWA (Apr.) 470

Unfair Labour Practice — Change in Working Conditions — Respondent sold and operations rationalized subsequent to onset of freeze — Elimination of profit sharing plan, implementation of incentive plan and selective treatment of employees — Business justification cannot sanction a breach of the freeze provision — Union's authority undercut — Breach of freeze — Consideration of remedial relief deferred

TRIM TRENDS CANADA LIMITED; RE U.S.W.A. (Apr.) 623

Unfair Labour Practice — Colleges Collective Bargaining Act — Duty of Fair Representation — Duty to Bargain in Good Faith — Employees seeking to enforce bargaining duty by means of fair representation complaint — Board declining to determine whether breach of bargaining duty — Union's conduct during negotiations not breach of fair representation duty — Complaint dismissed

ABRAMOWITZ, J. AND B. LYONS, ET AL.; RE O.P.S.E.U., THE ONTARIO COUNCIL OF REGENTS FOR COLLEGES OF APPLIED ARTS AND TECHNOLOGY, AND THE BOARD OF GOVERNORS, SHERIDAN COLLEGE OF APPLIED ARTS AND TECHNOLOGY (Apr.) 455

Unfair Labour Practice — Consent to Prosecute — Intimidation and Coercion — Witness —

Employer alleging respondents misled an arbitrator and intimidated a witness — Complaint found to be an abuse of the Board's process to gain a tactical advantage in respect of other pending complaints — No prima facie case

FITZHENRY AND WHITESIDE LIMITED; RE T.T.U., LOCAL 91 AND NELSON ROLAND (Apr.) 504

Unfair Labour Practice — Construction Industry — Duty of Fair Representation — Intimidation and Coercion — Ratification and Strike Vote — Manner in which local union meetings conducted not prima facie breach of fair representation duty — Political differences in union local insufficient to indicate intimidation and coercion — Complaint with respect to entitlement to vote in I.C.I. sector strike vote must be made to Minister under s. 149a and not to Board under s. 72(5) — Complaint dismissed as disclosing no prima facie case with respect to any of the pleaded sections of the Act

CONNOLLY, MICHAEL AND UCAL POWELL; RE C.J.A., LOCAL 27 (Feb.) 193

Unfair Labour Practice — Construction Industry — Practice and Procedure — Unfair labour practice complaint relating to carpentry framework within the residential sector — Complaint dismissed for delay and abuse of process

TORONTO HOUSING LABOUR BUREAU AND BRAMALEA LIMITED; RE C.J.A., LOCAL 27; RE L.I.U.N.A., LOCAL 183; RE PRESIDENTIAL GROUP LIMITED AND PRESIDENTIAL GROUP (BROOKSHIRE) LIMITED (Sept.) 1178

Unfair Labour Practice — Damages — Complaints relisted for hearing for the purpose of determining quantum of damages — Damages for loss of opportunity to negotiate a collective agreement discussed — Interest rate determined for complaints that were filed in different months — Costs denied — Respondent ordered to compensate union for half of its reasonable negotiating expenses — Union entitled to be reimbursed for costs incurred in producing materials regarding the lock-out — Duty of locked out employees to mitigate their damages reviewed — Lock-out pay provided to employees by the international union a compensable loss

BURLINGTON NORTHERN AIR FREIGHT (CANADA) LTD.;
RE T.T.U. NO. 91 (Aug.) 1064

Unfair Labour Practice — Damages — Practice and Procedure — Respondent's business records voluminous — Inappropriate for Board to direct respondent to move the documents away from its premises to allow the complainant to inspect them for purpose of assessment of damages — Amount of wages and benefits paid to employees working as strike replacements considered relevant to the assessment of damages

SHAW-ALMEX INDUSTRIES LIMITED; RE U.S.W.A.; RE GROUP OF EMPLOYEES (July) 1032

Unfair Labour Practice — Damages — Remedies — Duty of unfair labour practice complainant to mitigate damages not paralleling that of a former employee in a wrongful dismissal action — Complainant making reasonable efforts to mitigate her losses — Board having jurisdiction to award damages for mental distress but such damages denied here because claim made too late

JACMORR MANUFACTURING LIMITED; RE U.F.C.W. (Aug.) 1086

Unfair Labour Practice — Duty of Fair Referral — Duty of Fair Representation — Intimidation and Coercion — Union revoking permission granted complainants to work at Hydro — Complainants refusing to pay fines imposed for continuing to work — Union refusing to refer complainants out of hiring hall — Complaint of unfair labour practices dismissed

CRADDOCK, JOHN, ET AL.; RE U.A., LOCAL 527 (Dec.) 1488

- Unfair Labour Practice — Duty of Fair Referral — Duty of Fair Representation — Remedies — Union paying legal fees incurred by respondent in Board proceedings but not those of complainants — No breach of fair representation duty — Board having no jurisdiction to act as watch dog over internal union processes — No circumstances to warrant departure from policy of declining to award costs — Hearings protracted by both parties — Complainants' mixed success also militating against an award of costs
- D'ALESSANDRO, LUCIANO AND DONATO MARINARO; RE L.I.U.N.A., LOCAL 1089, AND ROCCO D'ANDREA.....(July) 986
- Unfair Labour Practice — Duty of Fair Representation — Allegation that union did not investigate complainant's discharge grievance — Board discussing extent of union's responsibility to investigate grievances — Investigation found to be inadequate considering serious nature of grievance — Grievor's lack of effort in aiding the investigation not ameliorating approach of union — Grievance ordered to arbitration
- MCLEOD, RAYMOND; RE CAMCO INC. AND U.E., LOCAL 550.....(Apr.) 547
- Unfair Labour Practice — Duty of Fair Representation — Complainant represented at an arbitration hearing by a union staff representative — Discharge upheld — Union not breaching duty by not hiring a lawyer for arbitration — Complaint dismissed
- BLAIR, WINSTON ALFONSO; RE U.S.W.A.; RE MIDAS CANADA INC. AND INTERNATIONAL PARTS MANUFACTURING LIMITED(Oct.) 1211
- Unfair Labour Practice — Duty of Fair Representation — Earlier s. 68 complaint resulting in Board directing that grievance be reinstated and rescheduled for arbitration — Board indicating in earlier decision that union had a right to settle the grievance prior to arbitration — Executive Board of union accepting a settlement that was unacceptable to the complainant — No breach of fair representation duty
- LIEBMAN, JEAN; RE YORK UNIVERSITY STAFF ASSOCIATION AND YORK UNIVERSITY.....(July) 1011
- Unfair Labour Practice — Duty of Fair Representation — Employer requesting that grievance proceed to arbitration but union refusing — Complainant alleging that union vice-president influenced by hostility towards employer — Board finding that union acting to correct mistaken interpretation of collective agreement by employer — Union acting in best interests of employees in bargaining unit — Complaint dismissed
- COSTA, MARIA FATIMA; RE L.I.U.N.A., LOCAL 183; RE BURLINGTON CANADA INC.....(Feb.) 199
- Unfair Labour Practice — Duty of Fair Representation — Grievor complaining about manner in which employer eliminated his job — Union refusing to process grievance to arbitration — Respondent may not rely in its defence on facts asserted in argument but not addressed in evidence nor is the mere belief of a respondent that it has not violated the Act of any assistance — No breach of duty — Complaint dismissed
- GATTELLARO, DOMENIC; RE U.A.W., LOCAL 222; RE CADBURY CANADA MARKETTING INC.(June) 844
- Unfair Labour Practice — Duty of Fair Representation — No collective agreement in effect when grievance filed — Preliminary objection to Board jurisdiction dismissed — Fair representation duty continues after expiry of agreement — One and one half year delay in processing complainant's grievance that employer did not recall complainant during layoff — No explanation for delay — Non-caring attitude constituting arbitrary conduct — Union ordered to process grievance
- XERRI, GEORGE; RE LOCAL 112 U.A.W. CANADA.....(Mar.) 444

- Unfair Labour Practice — Duty of Fair Representation — Part-time and full-time employees paying union dues according to same formula — Part-time employees paying proportionately more of their wages as dues — Whether dues structure “fair” outside scope of fair representation duty — Complaint dismissed
- FRY, BRIAN; RE TEAMSTERS UNION, LOCAL 419.....(Mar.) 365
- Unfair Labour Practice — Duty of Fair Representation — Practice and Procedure — Employer asking that it be named as an intervener rather than as a respondent — Board finding it desirable that employer be named as a respondent in a duty of fair representation complaint — No breach of duty by union in refusing to take complainant’s discharge grievance to arbitration
- HABIB, JOSEPH E.; RE GENERAL MOTORS OF CANADA LIMITED; RE U.A.W., LOCAL 1973.....(Dec.) 1501
- Unfair Labour Practice — Duty of Fair Representation — Practice and Procedure — Whether complaint should be dismissed on the basis of delay of approximately two years — Delay caused by lack of sophistication, need to obtain legal aid, and change of solicitors — Delay may be taken into account in respect of remedy — Board declining to dismiss complaint — Further hearings scheduled
- HINKSON, GEORGE; RE CANADIAN CONFERENCE OF TEAMSTERS, CHEMICAL, ENERGY & ALLIED WORKERS DIVISION, LOCAL 2177; RE BASF INMONT CANADA INC.....(Oct.) 1246
- Unfair Labour Practice — Duty of Fair Representation — Refusal to file discharge grievance because union thought requested remedy was inappropriate constituting arbitrary conduct — Declaration of breach of Act sole remedy
- HOWES, HOWARD J.; RE U.S.W.A., LOCAL 8222; RE DUOMATIC OLSEN INC.(Jan.) 55
- Unfair Labour Practice — Duty of Fair Representation — Union implementing a pension plan over the objections of most of the employees who would be covered by the plan — Union entitled to adopt a course of action other than that favoured by most employees once views of employees taken into account — Reasonable for union to conclude that long-run interests of bargaining unit members as a whole would benefit from the introduction of a pension plan — No breach of fair representation duty
- DANIELL, JOHN; RE TEAMSTERS’ UNION.....(July) 990
- Unfair Labour Practice — Duty to Bargain in Good Faith — Employer refusing to provide, when requested, the salaries being paid to each employee represented by the complainant — Same issue coming up at every negotiating round over the years — Board finding no justification for the notion that individual wage rates are confidential — Union not waiving the right to such information merely because it has bargained with respect to it — Breach of duty
- GLOBE AND MAIL, THE, DIVISION OF CANADIAN NEWSPAPERS COMPANY LIMITED; RE SOUTHERN ONTARIO NEWSPAPER GUILD, LOCAL 87 THE NEWSPAPER GUILD(Nov.) 1368
- Unfair Labour Practice — Duty to Bargain in Good Faith — Interference in Trade Unions — Remedies — Employer failing to meet with union to bargain within 15 day period — Employer engaging in course of conduct intended to thwart any meaningful bargaining — Conduct viewed in context of massive unfair labour practices during organizing drive — Breach of duty to bargain in good faith — Attendance of member of management at union

meeting contravening ss. 64 and 70 — Employer directed to prepare a collective agreement it is prepared to sign to be presented to union at a meeting with a mediator

MOREWOOD INDUSTRIES LIMITED; RE C.J.A., GENERAL WORKERS' UNION, LOCAL 1030.....(Jan.) 92

Unfair Labour Practice — Employee Reference — Interference in Trade Unions — Employer purportedly promoting employee to supervisory position and paying him more than wage rates in collective agreement — Employee not exercising managerial functions and continuing to be an employee for purposes of the Act — Employer breaching ss. 64 and 67 in bargaining directly with respect to his wage rate and in its attempt to circumvent the provisions of the collective agreement

REXWOOD PRODUCTS LIMITED; RE LUMBER AND SAWMILL WORKERS' UNION, LOCAL 2995 OF THE C.J.A..... (Feb.) 267

Unfair Labour Practice — Health and Safety — Practice and Procedure — Complainant's advisor refused admittance to respondent's property for the purpose of a view — Board having authority to order view and determine who should attend — Whether press should be excluded from hearing room or prohibited from publishing any evidence until the end of the case

STEEL COMPANY OF CANADA, INC.; RE BONITA CLARK; RE THE TORONTO STAR, THE HAMILTON SPECTATOR AND THE GLOBE & MAIL; RE U.S.W.A., LOCAL 1005.....(Jan.) 126

Unfair Labour Practice — In earlier proceeding respondent ordered to compensate employee for reducing his work hours contrary to the Act — Employee later resigning but requesting part-time work — Respondent refusing to re-hire employee on a part-time basis — Evidence insufficient to show total absence of anti-union animus — Respondent ordered to offer a part-time position to the employee

BURLINGTON AIR EXPRESS (CANADA) LTD.; RE T.T.U. NO. 91(Aug.) 1056

Unfair Labour Practice — Interference in Trade Unions — Employees of ambulance service asked by Ministry of Health to participate in pilot para-medical program by taking a leave of absence — Participants asked to sign leave renewal agreements on same terms and conditions when program extended — Whether employer bargaining directly with employees — Conditions of work outside the scope of the collective agreement from which the union derived its bargaining rights — No bargaining directly with employees — Complaint dismissed

SUPERIOR AMBULANCE LIMITED, R.J. ARMSTRONG AND AL ERLBUSCH; RE O.P.S.E.U..... (May) 772

Unfair Labour Practice — Intimidation and Coercion — Remedies — Labourers' Union representative making statement to carpenters performing concrete forming on residential job site that they must join the Labourers' Union to continue working on the job — Conduct amounting to intimidation and coercion in circumstances — Labourers' Union jointly responsible with employer for the damages arising from carpenters being removed from job site

LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 527, ANDRE ROY AND; RE C.J.A., LOCAL 93.....(Apr.) 523

Unfair Labour Practice — Practice and Procedure — Complaint alleging respondents acted together to interfere with her right to be properly represented — Motion to dismiss com-

plaint as disclosing no *prima facie* case — Review of jurisprudence on dismissal of complaint on such a ground — Respondents' motion dismissed

BALANYK, ELIZABETH; RE ONA; RE GREATER NIAGARA GENERAL HOSPITAL, ET AL. (Sept.)

1121

Unfair Labour Practice — Practice and Procedure — Employer objecting to Board hearing complaint because of delay — Employer's argument that complaint should have been filed when complainant became aware of alleged conspiracy to remove complainant from job rejected — Reasonable for complainant to file complaint only when alleged conspiracy made public — Not desirable for complainants to file suspicions — Board not prepared to dismiss complaint on basis of delay — Reverse onus provision applying to employer — Employer directed to proceed first

CONSUMERS DISTRIBUTING COMPANY LIMITED, TEAMSTERS' UNION, LOCAL 419 AND SEAN FLOYD; RE GHIAN SAROOP PERSAUD (May)

673

Unfair Labour Practice — Remedies — Sale of a Business — Employees of predecessor employer not hired by successor — Successor employer not obliged to continue the employment practices of the predecessor because collective agreement had expired at time of sale — No refusal by respondent to enter into an employment relationship with grievors because no evidence adduced that application made or others hired — Knowledge by respondent that unidentified persons wanted to work for it not sufficient to prove breach of Act — Complaint dismissed

NEW HOLIDAY TAVERN, THE HOLIDAY (A PARTNERSHIP), HOLIDAY ENTERTAINMENT INC. (GENERAL PARTNER), FORMERLY HARVEY WEISFELD AND ALAN CHARNEY, C.O.B. AS; RE INTERNATIONAL BEVERAGE DISPENSERS AND BARTENDERS UNION, LOCAL 280 (May)

753

Unfair Labour Practice — Settlement — Complainant signing minutes of settlement providing for withdrawal of complaint upon cash payment — Later claiming that settlement not legally binding because she was not represented by counsel and because of the consequences of the agreement — Party not allowed to repudiate a settlement because it falls short of what legal counsel may have obtained — Complaint withdrawn in accordance with the minutes of settlement

LAMBTON COUNTY BOARD OF EDUCATION, THE, C.U.P.E., LOCAL 1019 AND; RE BETTY JEAN LUNO (Oct.)

1277

Union Successor Status — Trade Union Status — Applicant claiming it is a successor trade union by virtue of disaffiliation with the respondent — Whether applicant disaffiliated with bargaining rights for intervener — Whether applicant is a trade union — Applicant found to have disaffiliated with its bargaining rights — Considerations with respect to establishing trade union status for new organizations inappropriate — Applicant Local was a trade union prior to disaffiliation and continues to hold its status as a trade union — Name of applicant at most a technical irregularity which cannot defeat a meritorious application — As applicant had not acquired bargaining rights by means of a transfer or jurisdiction, it is not a successor within the meaning of the Act — Application dismissed

COCA-COLA LTD.; RE INDEPENDENT LOCAL 385; RE B.F.C.S.D. AND ITS LOCAL 385 AND THE U.F.C.W. (May)

658

Union Successor Status — Transaction constituting a transfer of jurisdiction — Issue of whether employer swept into an ICI provincial agreement to which successor but not predecessor local is a party not relevant to legal question of whether a transfer has occurred — Quality

of union representation not relevant — Inappropriate for Board to define specifically the bargaining rights acquired

M.L.S. CABLE INSTALLATIONS INC.; RE I.B.E.W., LOCAL 353; RE GROUP OF EMPLOYEES.....(Nov.) 1413

Union Successor Status — Union meeting to vote on merger with another union — Irregularities with respect to notice of meeting and right to vote on merger — Law concerning trade union mergers will relieve against mere technical deficiencies where there has been substantial compliance with the spirit of constitutional provisions — Board making union successor status declaration

I.B.L. INDUSTRIES LIMITED; RE C.A.W.; RE GROUP OF EMPLOYEES (Sept.) 1144

Witness — Certification — Membership Evidence — Practice and Procedure — Two non-pay allegations made by respondent — Credibility of collector in issue — Evidence concerning criminal convictions of two witnesses admissible — Collector not in charge of organizing campaign found to have collected two cards without proper payment — All evidence secured by that collector rejected — Lack of credibility of another witness not destroying evidentiary value of membership he collected

OLYMPIA FLOOR & WALL TILE COMPANY, OLYMPIA & YORK DEVELOPMENTS LIMITED, C.O.B. AS; RE L.I.U.N.A., LOCAL 183; RE GROUP OF EMPLOYEES..... (May) 762

Witness — Consent to Prosecute — Intimidation and Coercion — Unfair Labour Practice — Witness — Employer alleging respondents misled an arbitrator and intimidated a witness — Complaint found to be an abuse of the Board's process to gain tactical advantage in respect of other pending complaints — No prima facie case

FITZHENRY AND WHITESIDE LIMITED; RE T.T.U., LOCAL 91 AND NELSON ROLAND (Apr.) 504

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